
United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

WILLAMETTE & COLUMBIA RIVER TOWING
COMPANY, a Corporation,

Plaintiff in Error.

vs.

ELLA A. HUTCHISON,

Defendant in Error.

TRANSCRIPT OF RECORD.

On Writ of Error to the District Court of the
United States for the District of Oregon.

Filed

JUL 29 1916

F. D. Monckton,
Clerk,

No.....

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United States Circuit Court of Appeals for the
Ninth Circuit.

WILLAMETTE & COLUMBIA RIVER TOWING
COMPANY, a Corporation,

Plaintiff in Error,

vs.

ELLA A. HUTCHISON,

Defendant in Error.

Names and Addresses of the Attorneys of Record:

SENN, EKWALL & RECKEN,
Yeon Building, Portland, Oregon,
for the Plaintiff in Error.

FRED OLSON, Endicott, Washington, and
LANGLEY & LANGLEY,
Board of Trade Building, Portland, Oregon,
for the Defendant in Error.

In the United States Circuit Court of Appeals for the
Ninth District.

WILLAMETTE & COLUMBIA RIVER TOWING
COMPANY, a Corporation,
Plaintiff in Error.

vs.

ELLA A. HUTCHISON,
Defendant in Error.

CITATION ON WRIT OF ERROR.

United States of America,—ss.

To Ella Hutchison,

Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein Willamette and Columbia River Towing Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 14th day of July, in the year of our Lord, one thousand, nine hundred and sixteen.

R. S. BEAN,
Judge.

Filed July 14, 1916. G. H. Marsh, Clerk.

State of Oregon,
County of Multnomah,—ss.

Due and legal service of the within Citation on Writ of Error, is hereby accepted in Multnomah County, Oregon, this 14th day of July, 1916.

LOTUS L. LANGLEY,
Attorney for Ella Hutchison.

Filed July 14, 1916. G. H. Marsh, Clerk.

**In the United States Circuit Court of Appeals for the
Ninth Circuit.**

WILLAMETTE & COLUMBIA RIVER TOWING
COMPANY, a Corporation,

Plaintiff in Error.

vs.

ELLA A. HUTCHISON,

Defendant in Error.

WRIT OF ERROR.

United States of America,—ss.

The President of the United States of America to
the Judge of the District Court of the United
States for the District of Oregon,

Greeting:

Because in the records and proceedings, as also
in the rendition of the judgment of a plea which is
in the District Court before the Honorable Charles
E. Wolverton, one of you, between Ella A. Hutchi-
son, Plaintiff and Defendant in Error, and Willa-

mette & Columbia River Towing Company, a corporation, Defendant and Plaintiff in Error, a manifest error hath happened to the great damage of the said Plaintiff in Error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness the Honorable Edward Douglas White, Chief Justice of the Supreme Court of the United States, this 18th day of May, 1916.

G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon.

(Seal)

Service of the within writ of error made this 18th day of May, 1916, upon the District Court of the United States for the District of Oregon, by filing

with me as Clerk of said Court a duly certified copy of said writ of error.

(Seal)

G. H. MARSH,
Clerk, United States District Court, District of
Oregon.

Filed May 18, 1916.

**In the District Court of the United States for the
District of Oregon.**

July Term, 1915.

Be it remembered, that on the 13th day of October, 1915, there was duly filed in the District Court of the United States for the District of Oregon, a Complaint, in words and figures as follows, to wit:

**In the District Court of the United States for the
District of Oregon.**

ELLA A. HUTCHISON,

Plaintiff.

vs.

WILLAMETTE & COLUMBIA RIVER TOWING
COMPANY, a Corporation,

Defendant.

COMPLAINT.

Comes now the plaintiff, and for cause of action against the above named defendant, alleges:

I.

That at all times hereinafter mentioned, defendant was and now is, a duly incorporated, organized and existing corporation, under and by virtue of the laws of the State of Oregon, and at all times

hereinafter mentioned, the owner of, and operating the same, as a common carrier of passenger and freight, for hire, a steamboat, known as the "J. N. Teal."

II.

That the plaintiff is the mother of R. Verne Hutchison, deceased, and under the laws of the State of Idaho, is the sole heir at law of said R. Verne Hutchison, deceased.

III.

That the plaintiff is now, and at all times hereinafter mentioned has been, a resident of the town of Endicott, State of Washington.

IV.

That the plaintiff brings this action as sole heir at law, under the statutes of distribution of the State of Idaho, of R. Verne Hutchison, deceased, and by virtue of section 4100 of the Revised Codes of Idaho, as prepared by John F. McLane, Code Commissioner.

V.

That at the date of death of R. Verne Hutchison, he was a resident of Endicott, State of Washington, was twenty-four years of age, and had a life expectancy of thirty-nine years.

VI.

That on May 3, 1915, while the steamboat "J. N. Teal" was in the Snake River, and docked at Lewis-

ton, Idaho, then being owned and operated by the defendant herein, R. Verne Hutchison was accepted by the defendant, thereon as passenger.

VII.

That said R. Verne Hutchison boarded said boat at first deck, and passed to the stern of said boat for the purpose of ascending to the upper deck. That for the purpose of using certain permanent stairs, generally used as a means of ascending and descending between the two decks, it becomes necessary for said R. Verne Hutchison to go upon the covering of the water-wheel of said steamer. That while attempting to ascend said stairs aforesaid, the covering of said water-wheel broke through, letting said R. Verne Hutchison fall through said water-wheel into the water of the said Snake River, and said R. Verne Hutchison was thereby drowned.

VIII.

That defendant was careless, reckless and negligent in the manner following:

(a) That defendant failed to provide a safe landing of stairs from the first to second decks.

(b) That defendant failed to warn decedent not to use said stairs, or not to go upon the covering of said water-wheel.

(c) That by reason of the lack of warning or guards, and the presence of the stairs, with a board leading from the railing of the lower deck to the base of landing of said stairs on said water-wheel, defendant thereby held out an invitation to de-

cedent to go upon the covering of the water-wheel and use said stairs.

(d) That the covering of said water-wheel was not sufficiently strong for the purpose for which said defendant was allowing the same to be used.

(e) That defendant allowed or permitted passengers, and more particularly this decedent, to go upon the covering of said water-wheel.

(f) That no other stairs leading from first to second decks was provided on said boat.

(g) That the covering of said water-wheel had been allowed to deteriorate in strength.

IX.

That each and every act and omission of defendant, as set forth in the preceding paragraph, was reckless, careless and negligent, and was and were the proximate cause and causes of said R. Verne Hutchison's death, as herein set forth.

X.

That the said R. Verne Hutchison was an intelligent, healthy and industrious young man. That there existed as between this plaintiff and R. Verne Hutchison, a strong tie of affection. That in the death of decedent, plaintiff has been deprived of the care, society and companionship of said R. Verne Hutchison, to plaintiff's damage, in the sum of Twenty-five Thousand Dollars (\$25,000).

WHEREFORE, Plaintiff demands judgment against said defendant for the sum of Twenty-five Thousand Dollars, together with her costs and disbursements herein.

FRED OLSON and
LANGLEY & LANGLEY,
Attorneys for Plaintiff.

State of Washington,
County of Whitman,—ss.

I, Ella A. Hutchison, being first duly sworn, depose and say: That I am the plaintiff in the foregoing action; that I know the contents of the foregoing complaint, and the same is true as I verily believe.

(Signed) ELLA A. HUTCHISON.

Subscribed and sworn to before me this 30th day of September, 1915.

(Signed) M. A. SHERMAN,
Notary Public for Washington.

(Seal)

My commission expires June 11th, 1919.

Filed October 13, 1915. G. H. Marsh, Clerk.

And afterwards, to wit, on the 15th day of November, 1915, there was duly filed in said Court, and Cause, an Answer, in words and figures as follows, to wit:

ANSWER.

Comes now the defendant in the above entitled action and for answer to plaintiff's complaint, defendant admits, denies and alleges as follows, to wit:

I.

Defendant admits paragraph 1 of said complaint.

II.

Defendant alleges that it is not sufficiently informed as to the truth or falsity of the allegations contained in paragraphs 2, 3, 4 and 5 of said complaint and therefore upon information and belief denies the same and the whole thereof.

III.

Defendant denies paragraphs 6, 7, 8, 9 and 10 of said complaint, and each and every allegation therein contained, except such allegations as are herein admitted, and defendant generally and specifically denies each and every paragraph, statement, matter, allegation and thing in said complaint contained and the whole thereof except such paragraphs and statements as are herein admitted and set forth.

For a first, separate and further answer and defense to plaintiff's complaint defendant alleges:

I.

That at all times herein mentioned the defendant was and now is a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Oregon, and is the owner of a certain steamboat known as the "J. N. Teal."

II.

That on or about the 3rd day of May, 1915, the said steamer J. N. Teal, was at the boat landing at Lewiston, Idaho. That at said time, the deceased, R. Verne Hutchison, boarded said steamer J. N. Teal. That thereupon said R. Verne Hutchison proceeded to the stern of said steamer J. N. Teal, and said R. Verne Hutchison, deceased, carelessly and negligently went out and upon the covering of the wheel of said steamer J. N. Teal. That said R. Verne Hutchison had no right or authority to go out and upon said covering of said wheel and said R. Verne Hutchison went out and upon said wheel, contrary to orders and against the wishes of this defendant. That because of the carelessness and negligence of said R. Verne Hutchison, deceased, in going out and upon said covering of said water wheel, the said covering broke, and said R. Verne Hutchison was precipitated into the water, and thereby drowned. That said R. Verne Hutchison, deceased, was careless and negligent in failing and neglecting to heed the warnings and orders and instructions of this defendant, not to go out on said covering, said warnings were given by means of a posted notice near said wheel and by an employe named Mohler, and said R. Verne Hutchison, carelessly and negligently failed to use his senses and faculties. That it was not necessary for said R. Verne Hutchison to go out on said covering of said water wheel and there was ample room in other parts of said boat, where the said R. Verne Hutchison, deceased, could have gone with perfect

safety to himself, and so far as this defendant is concerned, said accident and injuries were wholly accidental and unavoidable and could not have been foreseen by the exercise of ordinary care.

WHEREFORE defendant having fully answered plaintiff's complaint prays that same be dismissed and that it have judgment for its costs and disbursements herein.

ED. MENDENHALL and
F. S. SENN,

Attorneys for Defendant.



State of Oregon,
County of Multnomah,—ss.

I, W. E. Jones, being first duly sworn, depose and say that I am the secretary of the defendant in the above entitled action; and that the foregoing answer is true as I verily believe.

W. E. JONES.

Subscribed and sworn to before me this 11th day of November, 1915.

(Seal)

F. S. FENN,
Notary Public for Oregon.

My commission expires July 24, 1916.

State of Oregon,
County of Multnomah,—ss.

Due and legal service of the within Answer is hereby accepted in Multnomah County, Oregon, this 11th day of November, 1915.

LOTUS L. LANGLEY,
One of Attorneys for Plaintiff.

Filed November 15, 1915. G. H. Marsh, Clerk.

And afterwards, to wit, on the 21st day of December, 1915, there was duly filed in said Court, and cause, a Replication in words and figures as follows, to wit:

REPLICATION.

Comes now the plaintiff in the above entitled action, and for reply to defendant's first separate and further answer and defense, admits and denies as follows, to wit:

I.

Plaintiff admits Paragraph I of said first separate and further answer and defense, and also admits that on or about the 3rd day of May, 1915, the said Steamer "J. N. Teal" was at the boat landing at Lewiston, Idaho. That at the same time the deceased, R. Verne Hutchison, boarded said steamer "J. N. Teal."

II.

Plaintiff denies each and every allegation, except such allegations as are herein admitted contained

in defendant's first separate and further answer and defense.

WHEREFORE, Plaintiff having fully replied to defendant's first separate and further answer and defense, prays for judgment as asked for in her complaint.

FRED OLSON and
LOTUS L. LANGLEY,
Attorneys for Plaintiff.

State of Washington,
County of Whitman,—ss.

I, Ella A. Hutchison, being first duly sworn, depose and say: That I am the plaintiff in the above entitled action, and that the foregoing reply is true as I verily believe.

ELLA A. HUTCHISON.

Subscribed and sworn to before me this 13th day of December, 1915.

(Seal) M. A. SHERMAN,
Notary Public for State of Washington.

My commission expires June 11, 1919.

State of Oregon,
County of Multnomah,—ss.

I, L. A. Recken, attorney for defendant, hereby admit due service of the within reply at Portland,

Oregon, on the 21st day of December, 1915, by delivery to me of a duly certified copy thereof.

SENN, EKWALL & RECKEN,
Attorneys for Defendant.

Filed December 21, 1915. G. H. Marsh, Clerk.
And afterwards, to wit, on the 24th day of April, 1916, there was duly filed in said Court, and cause, a Verdict, in words and figures as follows, to wit:

VERDICT.

We, the duly empanelled and sworn jury in the above entitled action, find for the plaintiff, and assess her damages at Five Thousand Five Hundred Dollars.

G. A. PLIETH,
Foreman.

Filed April 24, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on Monday, the 24th day of April, 1916, the same being the 43rd Judicial day of the Regular March, 1915, Term of said Court; Present: the Hon. Charles E. Wolverton, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

JUDGMENT.

Now, at this day, come the parties hereto by their counsel as of Saturday; whereupon, the jury empanelled herein come into Court and return into Court their verdict, viz: "We, the duly empanelled and sworn jury in the above entitled action, find for the plaintiff, and assess her damages at Five

Thousand Five Hundred Dollars. G. A. Plieth, Foreman," which verdict is received by the Court and ordered to be filed; whereupon, it is considered that said plaintiff do have and recover of and from said defendant the sum of \$5,500, together with her costs and disbursements herein, taxed at \$227.75, and that she have execution therefor; and on motion of said defendant IT IS ORDERED that defendant be, and it is hereby allowed ten days from this date within which to file a motion for a new trial and thirty days within which to prepare and submit a bill of exceptions herein.

And afterwards, to wit, on the 18th day of May, 1916, there was duly filed in said Court, and cause, a Petition for Writ of Error, in words and figures as follows, to wit:

PETITION FOR WRIT OF ERROR.

The Willamette and Columbia River Towing Company, a corporation, defendant in the above entitled cause, feeling itself aggrieved by the judgment of the Court in the above entitled action, entered on the 24th day of April, 1916, by which it was adjudged that the plaintiff take judgment against this defendant in the sum of Five Thousand Five Hundred Dollars, and for plaintiff's costs and disbursements in the sum of \$..... comes now by its attorney, F. S. Senn, and petitions said Court for an order allowing said defendant to prosecute a writ of error to the Honorable, the United States

Circuit Court of Appeals, for the Ninth Judicial Circuit, under and according to the laws of the United States on that behalf made and provided; and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of said security all further proceedings in this court be suspended and stayed until the determination of said writ of error and your petitioner will ever pray.

ED. MENDENHALL and

F. S. SENN,

Attorneys for Defendant.

Filed May 18, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on Thursday, the 18th day of May, 1916, the same being the 64th Judicial day of the Regular March, 1916, Term of said Court; Present: the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

ORDER ALLOWING WRIT OF ERROR.

On the 18th day of May, 1916, came the above named defendant by F. S. Senn, its attorney, and filed herein and presented to the Court, its petition praying for the allowance of a writ of error, intended to be urged by the defendant, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered on the day of April, 1916, duly authenticated, may be sent to the United States Circuit

Court of Appeals for the Ninth Judicial Circuit, and such other and further proceedings may be had as may appear proper in the premises.

ON CONSIDERATION WHEREOF, the Court does hereby allow the said writ of error and that citation issue as by law provided.

IT IS FURTHER ORDERED that the amount of the supersedeas bond to be given by said defendant be and the same is hereby fixed at the sum of seven thousand dollars with good and sufficient surety to be approved by this Court, which bond now being filed with Daniel Kern and F. B. Jones, as sureties, is hereby approved and execution issued herein is recalled and stayed.

Dated May 18th, 1916.

R. S. BEAN,
Judge.

Filed May 18, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on the 18th day of May, 1916, there was duly filed in said Court, and cause, a Supersedeas Bond, in words and figures as follows, to wit:

SUPERSEDEAS BOND.

KNOW ALL MEN BY THESE PRESENTS: That the Willamette & Columbia River Towing Company, a corporation, as principal and Daniel Kern and F. B. Jones as sureties, are held and firmly bound unto Ella A. Hutchison, in the sum of seven thousand dollars, to be paid to the said Ella

A. Hutchison, for the payment of which well and truly to be made, we bind ourselves, our successors, executors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 8th day of May, 1916.

WHEREAS, the above named Willamette and Columbia River Towing Company, a corporation, has applied for and obtained a writ of error to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, to reverse the judgment rendered in the above entitled cause by the District Court of the United States, for the District of Oregon.

NOW THEREFORE, the condition of this obligation is such that if the said Willamette & Columbia River Towing Company, shall prosecute said writ to effect, and answer all damages and costs, if it shall fail to make good its plea, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

WILLAMETTE & COLUMBIA RIVER TOWING COMPANY,

By W. E. Jones, Secretary & Treasurer,
Principal.

Daniel Kern,

F. B. Jones,

(Corporate Seal)

Sureties.

State of Oregon,
County of Multnomah,—ss.

We, Daniel Kern and F. B. Jones, whose names are subscribed to the within undertaking as sureties, being severally duly sworn, each for himself says: That I am a resident and free holder within the State of Oregon, and am not a counsellor or attorney at law, sheriff, clerk or other officer of any Court, and am worth the sum of Fourteen Thousand Dollars, over and above all debts and liabilities, and exclusive of property exempt from execution.

DANIEL KERN,
F. B. JONES.

Subscribed and sworn to before me this 8th day of May A. D. 1916.

(Seal) F. S. SENN,
Notary Public for Oregon.

My commission expires July 24, 1916.

Approved this 15th day of May, 1916.

R. S. BEAN, Judge.

State of Oregon,
County of Multnomah,—ss.

Due and legal service of the within Bond is hereby accepted in Multnomah County, Oregon, this 8th day of May, 1916.

LOTUS L. LANGLEY,
One of the Attorneys for Plaintiff.

Filed May 18, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on the 3rd day of June, 1916, there was duly filed in said Court, and cause, an Assignment of Errors, in words and figures as follows, to wit:

ASSIGNMENT OF ERRORS.

Comes now the Willamette and Columbia River Towing Company, a corporation above named and in connection with its petition for a writ of error in the above entitled action, alleges, that there was error on the part of the District Court of the United States for the District of Oregon in regard to matters and things hereinafter set forth, and the defendant thereupon makes this, its assignment of errors:

ASSIGNMENT OF ERROR No. 1.

That the Court erred in overruling defendant's objection to the testimony of Dell Wilson, which was objected to by defendant, said testimony being as follows:

Q. State whether or not on this trip you were on the hurricane deck of the boat?

A. Yes, we were.

MR. SENN: Just a minute. Your Honor, we will object to that as irrelevant, immaterial and incompetent. It may have happened on any other trip not in evidence.

COURT: This is a previous trip?

MR. LANGLEY: This is a previous trip, and I am introducing this to cover exactly the same point

that I was introducing the photographs for, to show what the custom and practice was of the passengers of going to the hurricane deck, and that it serves the purpose of showing that the defense must have had notice that the upper deck was being occupied by passengers.

COURT: You are trying to show further here that there was no notice.

MR. LANGLEY: I beg your pardon?

COURT: You are trying to show further here that there was no notice?

MR. LANGLEY: Yes.

COURT: That particular day. Special notice ought to have applied to the day of the accident.

MR. LANGLEY: If your Honor understands me. I don't mean by that that I am attempting to say that there was posted notice, by the depositions; that is not the purpose of this deposition.

COURT: I think you can show the custom or practice of going to the upper deck; I will permit you to do that, but I don't think you ought to show notice on that day. Notice should have been given on another day, so far as this accident—

MR. LANGLEY: The remark that I made of notice, perhaps the Court misunderstood what I mean by that; I mean that that would be notice to the defense that there were passengers going to the upper deck; that is the question I referred to.

COURT: Read that question again.

MR. LANGLEY (continues reading deposition):
State whether or not on this trip you were on the hurricane deck of the boat? A. Yes, we were.

Q. State whether or not your wife and daughter were on the hurricane deck of this boat on this trip?

A. Yes, they were.

Q. If your answer is that you and your wife and daughter were on the hurricane deck of this boat on the trip above referred to, state by what stairs, if any, you and your wife and daughter ascended to the hurricane deck.

A. We went up by the stairs over the water house.

Q. If you testify that you and those accompanying you had ascended by the stairs leading from the covering of the water wheel to the hurricane deck, state whether or not you saw other persons than those engaged in the service of the boat using the same stairs as a means of ascent to the hurricane deck.

A. I did, I saw women and the band boys and men too, that I don't think were employed by the boat.

Q. If you testify you saw other persons than those engaged in the service of the boat using the stairs, state about how many.

A. I would say a dozen or fifteen, before I went up, besides the number that went up afterwards.

Q. State whether or not you saw other persons than your wife and daughter upon the hurricane deck of the boat on this trip.

A. I did.

Q. If your answer be that you did see other persons than those mentioned, state about how many persons you saw on the hurricane deck.

A. In the neighborhood of thirty or forty.

MR. SENN: Just a minute, Your Honor, those are all objected to. I would like to get the ruling of the Court.

COURT: The ruling of the Court will be that the objection will be overruled.

MR. SENN: Exception allowed?

COURT: Yes, you have an exception.

MR. SENN: To all these?

COURT: Yes.

ASSIGNMENT OF ERROR No. 2.

That the Court erred in overruling defendant's objection to the testimony of Ella A. Hutchison, which was objected to by the defendant, said testimony being as follows:

* * * Q. What, if any, degree of affection existed upon the part of R. Verne Hutchison for yourself, and upon your part for your son R. Verne Hutchison?

MR. SENN: We will object to that as irrelevant, incompetent and immaterial and not a measure of damages—not an element.

COURT: I will overrule that objection; I think that is proper.

MR. SENN: Save an exception.

THE COURT: Very well, you will be allowed an exception.

ASSIGNMENT OF ERROR No. 3.

That the Court erred in overruling defendant's motion for a directed verdict, said motion being as follows:

“Your Honor, just for the sake of the record, I would like to move for a directed verdict on the ground that there has not sufficient evidence been introduced to submit to the jury, and second the evidence shows that the deceased took this position voluntarily, without orders or directions from anyone and was guilty of contributory negligence.

COURT: Very well; the Court will overrule the motion.

MR. SENN: And allow an exception?

COURT: You may have your exception.

ASSIGNMENT OF ERROR No. 4.

That the Court erred in refusing to instruct the jury as follows:

“It is in evidence in this case that there was a stairway running from the second to the hurricane deck of this boat, and it appears, that this stairway at the stern of the boat was provided by the defendant company. It was the duty of the defendant company to exercise a high degree of care in maintaining and keeping in order this stairway, providing it permitted this stairway to be used by passengers

who may have been on the boat at the time of the accident, but this duty of maintaining this stairway and keeping it in good condition did not extend to the keeping of the covering of the wheel in good condition, providing you find that this wheel covering was not constructed or intended for use by passengers in walking over it; in other words, the defendant was under no obligation to the deceased R. Verne Hutchison to keep the covering of the wheel in good condition, provided this covering of the wheel was not intended to be used as a passage-way by the deceased, and was not intended for that purpose, so that if you find that the covering over this wheel was merely for the purpose of keeping the wheel from throwing water onto the deck of the boat and was not constructed or intended to be used as a passageway or runway for passengers, then I instruct you there was no obligation on the part of the defendant company to keep in repair or condition this covering, of the wheel, and your verdict must then be for the defendant company.”

ASSIGNMENT OF ERROR No. 5.

That the Court erred in refusing to instruct the jury as follows:

“There is another rule of law to which I will call your attention, which is as follows: Where there are two ways of reaching a given point; one of which is dangerous and the other safe, it is the duty of a person to pursue the safe way; so in this case if you find

that the company had provided a ladder or stairway from the second to the hurricane deck and that this was a safe way by which to reach the hurricane deck, and that the deceased R. Verne Hutchison could have proceeded up the ladder, but instead, walked out upon the covering of the wheel, which was out of his way, and which was apparently dangerous, and he could see that this covering, or as a person of ordinary prudence ought to have seen that this covering was not intended to walk upon, then I instruct you that the plaintiff cannot recover damages in this case, and your verdict must be for the defendant.”

ASSIGNMENT OF ERROR No. 6.

That the Court erred in refusing to instruct the jury as follows:

“You must first consider whether or not the defendant company has been negligent, and whether the defendant company is liable to the plaintiff in damages. If you find that the defendant company is not liable in damages under the instructions as heretofore given, then that will end your deliberations, and your verdict must be for the defendant. If on the other hand, you find that the defendant company is liable in damages under the instructions heretofore given and the evidence as you have heard it, then it is your duty to assess the damages to which the plaintiff is entitled. In assessing damages, you are not to be guided by sympathy or prejudice. The mere fact that the defendant is a corpo-

ration should not influence you one way or the other in awarding damages. The question of the defendant being a corporation is immaterial so far as your deliberations in this case are concerned, nor are you to award any damages because of sympathy or feeling which you may have for the plaintiff and the relatives of this deceased. The law aims in all cases of this kind, when a person is entitled to damages, at compensation for the pecuniary loss which the plaintiff has suffered by reason of the death. It is in evidence here that the deceased was 24 years of age. He was a single man and his mother is his sole beneficiary and heir. It is in evidence that the mother is 59 years old. In your deliberations if you come to the question of damages you may consider the age of the deceased R. Verne Hutchison; you may consider his habits, his industry, his physical condition, his intelligence and the ties of friendship and affection which existed between the deceased and the plaintiff. You may also consider the age of the mother and her physical condition, the probable length of her life, and the probable pecuniary loss, if any, which she will suffer by reason of the death of this deceased, and award such damages, taking into consideration all of the elements I have mentioned, as will reasonably compensate the plaintiff for the pecuniary or money loss which she has suffered as a result of the death of deceased."

ASSIGNMENT OF ERROR No. 7.

That the Court erred in instructing the jury as follows:

“Now to particularize a little, the defendant was required to properly officer its boat so as to properly handle the crowd and to keep it in the place it ought to be on and about the boat and to prevent its going on or about places it ought not to go or in places that would be dangerous; and also it should give proper warning, and it might do that by notice or it might do that by having officers stationed about the boat in order to prevent the crowd from going into dangerous places; and to this end it should give proper warning of danger and peril. It should also see that all gangways and walks and passages which the public were allowed to use should be safe and protected; and if peril threatened at any place that place should be properly guarded by barriers and guard rails and ropes so as to prevent intrusion beyond the limits of the passageway, and in this way the passengers should be protected, especially upon occasions of this kind, where the boat was thronged with people. And so it will be for you to determine as to the place where the accident occurred. You will take into consideration the roof above the wheel and determine its condition; you will take into consideration the walkway passing back to the foot of the ladder and how that was arranged, and you will take into consideration the way in which they got from the walkway onto the ladder, and then you will determine whether, under the conditions and circum-

stances, the way was properly protected so that people would not get into danger. Determine, first whether it was dangerous to go upon this covering and then, second, whether it ought to have been protected differently from what it was, and then you will determine from all that whether or not the defendant was negligent, having in mind the rule that I have given you as to the degree of care it should exercise in the premises.”

SENN, EKWALL & RECKEN,
Attorneys for Defendant.

State of Oregon,
County of Multnomah,—ss.

Due and legal service of the within Assignment of Errors is hereby accepted in Multnomah County, Oregon, this 3rd day of June, 1916.

LOTUS L. LANGLEY,
One of Attorneys for Plaintiff.

Filed June 3, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on the 17th day of June, 1916, there was duly filed in said Court, and cause, a Bill of Exceptions, in words and figures as follows, to wit:

BILL OF EXCEPTIONS.

Portland, Oregon, April 21, 1916, 10 o'clock a m.
BEFORE HON. CHARLES E. WOLVERTON,
JUDGE AND JURY.

Now, at this time, this cause comes on for trial be-

fore the Honorable Charles E. Wolverton, Judge of the above entitled Court, and jury, the plaintiff appearing by Lotus L. Langley, Manche Langley and Fred Olsen, her attorneys, and the defendant appearing by Mr. F. S. Senn, its attorney.

Whereupon the following proceedings were had:

MR. SENN: I would like to say to your Honor, that the J. N. Teal is now at the foot of Taylor Street, and after the opening statements I presume that would be the proper time, we would like to have the jury go down and view the boat.

COURT: Any objection to that?

MR. LANGLEY: I have no particular objection to that; however, we have pictures that show the portion of the boat that will be material in the matter and I think that there could be no question as to the correctness of the pictures, but if the Court is of the feeling that it will aid the jury in understanding the physical conditions I certainly have no objections.

COURT: The view of the boat might aid the interpretation of the pictures.

MR. LANGLEY: Yes, that is right.

COURT: I think the Court will allow it, and when you have made your statement to the jury, the Court will give directions so that the jury may view the boat.

MR. LANGLEY: I would like to ask the Court to insert the name of "River" in the corporation name of the defendant. It was inadvertantly omit-

ted. It is agreed by the attorney that that might be inserted.

COURT: Very well.

(Opening Statements).

Whereupon proceedings herein adjourned to 2 P. M.

Portland, Oregon, April 21, 1916, 2 P. M.

MR. LANGLEY: I wish to introduce the deposition of Mrs. TIFFT.

(Reads deposition of Laura E. Tifft to jury.)

MR. LANGLEY (reading): "I hand you a picture marked for identification 'S. R. C.' and ask you whether or not to the extent of the picture, this picture represents the physical conditions of the boat, 'J. N. Teal' in every detail and particular, as the same existed at the time above referred to. A. That is the way it looked to me." (Continuing) I have the picture here and I would like to introduce it in evidence.

Picture marked PLAINTIFF'S EXHIBIT 1.

MR. LANGLEY: Gentlemen, you can pass that along.

MR. SENN: Just a minute, I understand the offer is merely for identification.

MR. LANGLEY: I will offer it in evidence.

MR. SENN: Is there anything, Mr. Langley, as to when this picture was taken? Do you know when it was taken?

MR. LANGLEY: I could tell when it was taken, but I don't understand that that would be neces-

sary for the purpose of introducing it in evidence so long as it shows the condition that existed at that time.

COURT: Who took the picture?

MR. LANGLEY: The picture was taken by a young gentleman in Endicott. I think in a day or two following this occurrence. The question that I have asked the lady is this: "I hand you a picture marked for identification 'S. R. C.' and ask you whether or not to the extent of the picture this picture represents the physical conditions of the boat J. N. Teal in every detail and particular as the same existed." She has previously testified that she was there at the stern of the boat at the time of the cry of "Man overboard."

COURT: You say this picture was taken a day or two after?

MR. LANGLEY: It was taken a day or two after, but I am saying that that picture shows the conditions that existed at that particular time. I could not bring the photographer here.

COURT: Let me see the picture.

MR. SENN: I don't believe we will object to it, Your Honor.

COURT: Very well, let it go in. Let me see it. (Inspects picture.)

MR. LANGLEY: Gentlemen, you can just pass that along and look at it. (Continues reading): "State whether or not you were verbally warned not to go upon the covering of the water-wheel, or not to go to the upper or hurricane deck of said boat, or not

to use the stairs leading from the covering of water-wheel to upper deck, or given any verbal warning of any kind, character or nature.

A. I was not."

MR. SENN: That was objected to, Your Honor, and I think the objection might be well taken on this ground, as I understand this lady did not go to the hurricane deck, did not attempt to go to the hurricane deck, she was simply one of the passengers of three hundred or three hundred and fifty, and I think the fact that she didn't try to go there, made no effort to go there, that she was not told to go there would not be any evidence in this case.

COURT: She was one of the passengers on the deck?

MR. SENN: Yes.

COURT: She was on the passenger deck?

MR. SENN: She was on the passenger deck, but as I understand made no effort to go to the hurricane deck.

COURT: I understand, but she was there; I think I will admit the testimony.

MR. LANGLEY: That completes the deposition of Mrs. Tiff.

I introduce in evidence the deposition of G. V. Barker.

(Reads deposition of G. V. Barker.)

MR. LANGLEY (reading): "I hand you a picture marked for identification 'H. L. W. No. 2'"—First, however, I wish to offer the first picture, No. 1 in evidence.

COURT: Very well.

MR. SENN: We will object to that picture. Your Honor, as I understand in the deposition it wasn't offered in evidence, merely marked for identification. I think at the time of the taking of the deposition they should have offered it in evidence and without introduced at that time they cannot introduce it now. Second, that this appears to be a picture taken the day before the accident, when the conditions might not have been the same, or are different, and I think for that reason it would not be admissible.

COURT: I presume it is to show the matter of the boat; that is, the construction and form of the boat, is that what it is introduced for?

MR. SENN: It does not show that at all.

MR. LANGLEY: It is not for that purpose.

COURT: I will sustain the objection.

MR. LANGLEY: That is all.

MR. SENN: We raise the same objection to this picture. The same thing.

MR. LANGLEY: That is all of that deposition. (Reads deposition of Dell Wilson.) Reading: "State whether or not on this trip you were on the hurricane deck of the boat?"

A. Yes, we were."

MR. SENN: Just a minute, Your Honor, we will object to that as irrelevant, immaterial and incompetent. It may have happened on any other trip not in evidence.

COURT: This is a previous trip?

MR. LANGLEY: This is a previous trip, and I am introducing this to cover exactly the same point that I was introducing the photographs for, to show what the custom and practice was of the passengers of going to the hurricane deck and that it serves the purpose of showing that the defense must have had notice that the upper deck was being occupied by passengers.

COURT: You are trying to show further here that there was no notice?

MR. LANGLEY: I beg your pardon?

COURT: You are trying to show further here that there was no notice?

MR. LANGLEY: Yes.

COURT: That particular day. Special notice ought to be applied to the day of the accident.

MR. LANGLEY: If Your Honor understands me, I don't mean by that that I am attempting to say that there was posted notice, by the deposition; that is not the purpose of this deposition.

COURT: I think you can show the custom or practice of going to the upper deck. I will permit you to do that, but I don't think you ought to show notice on that day. Notice should have been given on another day, so far as this accident—

MR. LANGLEY: The remark that I made of notice, perhaps the Court misunderstood what I mean by that; I mean that that would be notice to the defense that there were passengers going to the upper deck; that is the question I referred to.

COURT: Read that question again.

MR. LANGLEY (continues reading deposition):
“State whether or not on this trip you were on the hurricane deck of the boat.

A. Yes, we were.

Q. State whether or not your wife and daughter were on the hurricane deck of this boat on this trip.

A. Yes, they were.

Q. If your answer is that you and your wife and daughter were on the hurricane deck of this boat on the trip above referred to state by what stairs, if any, you and your wife and daughter ascended to the hurricane deck.

A. We went up by the stairs over the water-house.

Q. If you testify that you and those accompanying you had ascended by the stairs leading from the covering of the water-wheel to the hurricane deck, state whether or not you saw other persons than those engaged in the service of the boat using the same stairs as a means of ascent to the hurricane deck.

A. I did; I saw women and the band boys, and men, too, that I don't think were employed by the boat.

Q. If you testify you saw other persons than those engaged in the service of the boat using the stairs, state about how many.

A. I would say a dozen or fifteen, before I went up, besides the number that went up afterwards.

Q. State whether or not you saw other persons

than your wife and daughter upon the hurricane deck of the boat on this trip.

A. I did.

Q. If your answer be that you did see other persons than those mentioned, state about how many persons you saw on the hurricane deck.

A. In the neighborhood of thirty or forty."

MR. SENN: Just a minute, Your Honor, those are all objected to. I would like to get the ruling of the Court.

COURT: The ruling of the Court will be that the objection will be overruled.

MR. SENN: Exception allowed?

COURT: Yes, you have an exception.

MR. SENN: To all these?

COURT: Yes.

MR. LANGLEY (reading): "State whether or not there were notices posted—

COURT: Before you read the answer—

MR. LANGLEY: —near the water-wheel of said boat or on said boat at all giving warning not to go out on the covering of the water-wheel, or not to go to the hurricane deck, or not to use the stairs leading from the covering of the water-wheel to the upper or hurricane deck of said boat, or any notices of any kind, character or nature, whatsoever, which had to do, or referred to the use of the stairs from the covering of the water-wheel to the upper or hurricane deck."

COURT: I think you ought to confine that ques-

tion to the day of the accident, or questions of that nature.

MR. LANGLEY: Does Your Honor understand that this was the same day?

COURT: I thought it was the day before.

MR. LANGLEY: No, this man was taking a ride the morning of the same day.

COURT: How long before the accident?

MR. LANGLEY: Well, I think that he could not have been more than an hour—I think the deposition will show.

COURT: I will hear the testimony then; I will overrule the objection.

MR. SENN: Not the same trip, Your Honor, a different trip.

COURT: Yes, I understand; it is so near the time I will permit that to go to the jury.

MR. LANGLEY (finishes reading deposition): I read the deposition of John Bostock (reads deposition). Reading: State whether or not on this trip you were on the upper deck of the boat.”

MR. SENN: I think, Your Honor, counsel ought to read the objections that are made as we go along, so that the record will show.

MR. LANGLEY: There are no objections here noted in this deposition at all, there was no objection.

MR. SENN: There were objections in all the other depositions that were not read by counsel.

COURT: There is no need to take up the time of the Court in reading the objections unless you in-

sist on the objections, and if you insist on the objection the Court will hear you.

MR. SENN: Yes.

MR. LANGLEY (reading): If your answer is that you were on the upper deck of the boat on previous trip on May 3, 1915, state by what stairs, if any, you ascended to the upper deck."

MR. SENN: Now, at this time I will object on the ground it is irrelevant, immaterial and incompetent.

COURT: The objection will be overruled. You may proceed.

MR. LANGLEY (completes reading of deposition.) The deposition of Gottfried Herbst. (Reads.) The deposition of Miss Lowrey. (Reads deposition of Mertice Lowrey.) The deposition of Hazel Armstrong. (Reads deposition of Hazel Armstrong.) The deposition of L. R. Stebbins. (Reads deposition of L. R. Stebbins.) The deposition of Mrs. C. E. Stebbins. (Reads deposition of Mrs. C. E. Stebbins.) The deposition of Dr. J. Floyd Tiffit. (Reads deposition of Dr. Tiffit.) "I hand you a picture marked for identification 'S. R. C.' and ask you whether or not to the extent of the picture, this picture represents the physical conditions of the boat 'J. N. Teal' in every detail and particular as the same existed at the time above referred to.

A. Yes, with the exception of the steps, which appear heavier." I think that I will ask to offer that picture in evidence at this time. It is exactly the same picture as Mrs. Tiffit identified.

MR. SENN: No objection.

Picture marked Plaintiff's Exhibit 2.

MR. LANGLEY (completes reading of Dr. Tiff's deposition.) I think that is all the depositions, with the exception of the deposition of plaintiff in the case, and that is quite lengthy. I assume that the jurors are tired of depositions and I would like to ask the privilege of introducing that latter in the case.

RANDALL RAY TUTTLE, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Langley:

Q. Your name is what?

A. Randall Ray Tuttle.

Q. And where do you reside?

A. My present address is Spokane.

Q. What is your occupation?

A. I teach bands.

Q. Where were you May 3, 1915?

A. I was in Lewiston with the college band.

Q. What position did you have with the band?

A. I was military captain of the band and assistant director.

Q. Were you aboard the boat J. N. Teal May 3, 1915?

A. I was.

Q. I wish you would in your own language, Mr. Tuttle, state from the time that you started to go

aboard to the time of the accident of Mr. R. Verne Hutchinson—what you observed and what your movements were?

A. We formed a line on the bank, and walked up the plank—or the gang plank to the boat. I was given the pass by Mr. Herbst and I showed this to a man—to an officer who was taking the tickets.

Q. Just a moment there before you proceed further, Mr. Tuttle, I hand you a card, Mr. Tuttle, as found in the deposition of E. D. Potvin, and ask you if you have ever seen that card before?

A. That is the pass that I had, I showed at the gang plank.

MR. LANGLEY: I will ask to introduce that in evidence.

COURT: A pass on the boat?

A. A pass to the boat.

COURT: To the boat.

MR. SENN: We have no objection to the pass.

Pass marked PLAINTIFF'S EXHIBIT 3.

Q. What did you do with the card that I have just handed you, on your going on to the boat?

A. I showed the card to the officer and then kept it. He told us to go on and go to the top deck. I kept the card.

Q. The captain of the boat didn't take up the card?

A. The officer to whom I showed the card didn't take it.

Q. Now, just another preliminary question. Did you see anyone using the stairs leading from the cov-

ering of the water wheel to the hurricane deck before you went aboard of the boat.

A. While I was on the shore, I saw the Kamiah band come down by that way.

Q. About how many was there in that band?

A. I should judge there was between twenty and thirty.

Q. That is another band, as I understand, than the band that you belong to?

A. Yes.

Q. Was that a band that was on a previous trip on the boat?

A. They were on the trip just preceding the one which we were to go.

Q. I will ask you to state to the jury, if you will, Mr. Tuttle, whether there were people on the upper deck of the boat—the hurricane deck at the time you went aboard?

A. I saw people coming down from there when we were on the shore; as to whether there were or not when I went aboard, I am not sure whether there were still people or not, I don't know.

Q. Now, you can, in your own language—well, just another question, Mr. Tuttle, was there chairs on the hurricane deck at the time that the band had come down from the upper deck?

A. Yes, there were.

Q. How many chairs were there there?

A. The entire Kamiah band was seated as they came down the river, before landing.

Q. Were the chairs left there at the time that you started to go aboard?

A. They were, yes.

Q. Now, you may state to the jury in your language, Mr. Tuttle, the movements of yourself and your companions from the time that you started to go aboard until the occurrence of this accident.

A. We formed a line, single file, and walked up the plank. I showed the pass to the officer, he told us to go to the top deck and then we went on. We went on to the side of the boat that was next to the shore, up the stairway to the passenger deck—the first passenger deck, from there we walked straight back to the plank that goes over to the wheel-house and were out on the wheel-house some of us, just preparing to go up the stairs when the crash came. I don't know what the other boys did after that, they were right near there because I fell toward the boat and crawled over the railing back onto the deck.

Q. I will ask you, Mr. Tuttle, whether or not there is a ladder that leads from the side of the deck on the side that you and your companions entered on, from the second to the upper or hurricane deck?

A. There was no ladder on that side.

Q. Have you examined the boat today?

A. I have, yes.

Q. Did you see an iron ladder there today?

A. Not on that side.

Q. How is that?

A. Not on the side of the boat which we boarded.

COURT: Did the officer tell you how to go that time?

A. No, I think not; he told us to go to the upper deck—go to the top deck.

Q. Then, if I understand you correctly, the side that you went in on there was no ladder from the second to the upper deck?

A. No, there was no ladder.

Q. The side that you saw the ladder on today is on the opposite side of the side that you went in on?

A. Yes, it it.

Q. Now, I wish you would tell the jury whether or not there were notices any place about the boat which you saw was a warning not to go out on the covering of the water-wheel or a warning of any character?

A. I saw no notices to that effect at all.

Q. I wish you would state whether or not there was any guard there that was giving verbal warning of any character?

A. There was not.

Q. Now, did you examine the place where Mr. Hutchison fell through the cover of the water-wheel after this occurred?

A. Yes, I went back and examined it after three or four hours.

Q. I wish you would state to the jury what the result of your examination was, as to whether or not the break and the material that was examined indicated a decayed condition of the cover of the water-wheel?

A. The break in the flooring or ceiling, whichever the top is of, indicated that that was badly decayed. It was discolored and broken square off, the rafters or the circular pieces on which that was fastened were also very badly discolored and they were more or less squarely off, not splintered. I would say from looking at it it was decayed.

Q. Can you inform us about where you were standing at the time that Mr. Hutchison fell through the covering?

A. I was at the wheel-house—on the wheel-house near the ladder. I should judge hardly more than a foot from the ladder—from the stairs.

Q. Were there other passengers using the stairs at the time?

A. There were, yes.

Q. Was that your reason for not going up the stairs, at the time?

A. Yes, it was.

Q. Now, I wish you would state to the jury, Mr. Tuttle, whether there was any element of rowdyism there upon the part of any of the passengers that was then on the cover of the water-wheel?

A. There was none whatever that I noticed.

Q. Was there any jumping or scuffling or tussling among the members of your party or any other party that was on the cover of the water-wheel at the time that this occurred?

A. No, there was not.

MR. LANGLEY: I think that is all.

CROSS-EXAMINATION.

Questions by Mr. Senn:

Mr. Tuttle, did you hear the deposition read a minute ago of one of the band boys who said he jumped up and down on the wheel and nobody told him to stop it?

A. That wasn't a band boy.

Q. Mr. Bostock was another fellow, he didn't belong to the band.

Q. Was he there at the time?

A. I remember having seen him in Lewiston that day.

Q. You saw him do that?

A. No, I didn't see him.

Q. You didn't see him.

Q. How many of you boys were on the covering of the wheel at the time it broke through?

A. I should judge six or eight.

Q. And besides you boys, how many others were there, passengers besides you?

A. I should judge six or eight altogether.

Q. But practically all of them were band boys?

A. There were one or two women.

Q. Now, how did you get to the covering of that wheel, over the railing?

A. Yes, there is a step, a seat below the rail, step to that from that to the rail and walk out on the plank.

Q. Did you climb over the railing or did you follow the plank walk?

A. Followed the plank walk going there.

Q. And instead of taking the stairs to the right and going to the hurricane deck as you could have, you went out on the wheel-house?

A. Stepped on the wheel-house preparing to go up the ladder, up the stairs.

Q. I will ask you to examine this picture and state whether or not that is a true representation of the condition there at the time of this accident.

A. As I remember it the other plank was lower.

Q. Well, is that substantially correct?

A. Well, there is a plank there, but it reaches higher toward the top of the wheel-house than in my recollection the other plank was, as the picture is making it easier to step onto the stairs.

Q. I will hand you Plaintiff's Exhibit 1 and ask you whether that is correct as has been testified to here in the depositions as being a correct representation of the conditions there?

A. This seems to be nearly correct.

Q. Well, now, what was to prevent you from stepping off the plank onto the stairway and going to the hurricane deck?

A. I possibly could have done it.

Q. But instead of that you went out on the wheel covering, six or eight of you?

A. I stepped onto the wheel covering.

Q. And six of eight of the other boys did?

A. I think there were six or eight altogether, other passengers and—

Q. You formed on the bank in single line, did you, the boys?

A. Single line, yes.

Q. And did you march down to the boat Indian style?

A. We walked up the plank in that manner.

Q. In Indian style.

A. Then we broke rank.

Q. Did you go on the boat lockstep or college style?

A. No—well, we walked up the plank single file and was together while he—because he was taking other tickets at the same time and just as soon as we got off the plank we broke our rank.

Q. And you all marched back to the back end?

A. No, we broke ranks at the end of the plank and walked back to the back end.

Q. Where did the rest go that didn't come to the back end?

A. They were on the way, I presume.

Q. You were all together there?

A. Most of the band was on the boat.

Q. Well, you all went to the back end of the boat together, did you not?

A. We were not in a body; we broke and mixed with the other passengers.

Q. You say there was no one there who told you not to go on the wheel covering?

A. Yes, there was no one.

Q. And there was no one there who told you to go on the wheel covering, was there?

A. No, I think not.

Q. You went there of your own accord?

A. Yes.

Q. Onto the covering of the wheel?

A. We went where we had seen the others come down.

Q. Was it a wet day or was it sunshiny?

A. As I remember, the sun was shining.

Q. That covering is rounded, hood-shaped, is it not?

A. Yes sir.

Q. You could have stepped from the plank right onto the lader and gone up to the hurricane deck?

A. Yes, it would have been possible, I believe, by a right angle turn.

Q. But instead of that six or eight of you went out on this hurricane deck, or on this wheel covering?

A. I stepped on the wheel covering, yes, before going further.

Q. And Mr. Hutchison did the same?

A. I think he did, yes.

Q. Well, what were you all doing out here on this wheel covering?

A. We were intending to go on up the stairs when we could.

Q. Why didn't you go on up the stairs when you walked across the plank?

A. We were waiting for other people to go up; there was a lady on the stairs, as I remember it.

Q. Well, you could have gone from the plank right up the stairs, couldn't you?

A. We could have, I presume, by making a sharp turn.

Q. Well, you must have gone out on that covering for some purpose; what was it?

A. In order to get to the hurricane deck by means of the stairs.

Q. What was it?

A. It was easier to go up the stairs that way than to make a right angle, turn clear around.

Q. You mean to say that six or eight of you walked across the plank and took your position on the covering of wheel and waited there until a lady has ascended the stairs and then you were going—

A. My own position—I went—walked out on the plank, stepped on the wheel-house and was preparing to go up the stairs as soon as I could.

Q. Was Mr. Hutchison ahead of you?

A. No, he wasn't.

Q. Did he come right behind you?

A. He must have, I was ahead.

Q. Was he further out on the wheel-house than you?

A. I could not say as to that.

Q. Did you have any friends or leave any people on the shore?

A. I don't know. There were lots of people there, but I don't think anyone that I—

Q. Did you have any band instruments with you?

A. We did not.

Q. You had nothing with you at all?

A. No.

Q. I will show you this picture and ask you

whether or not that is not a substantially correct representation of the condition of the wheel and the steps and the stairs at the time of this accident?

A. I believe it is about correct.

MR. SENN: I will offer it in evidence, Your Honor.

MR. LANGLEY: We have no objection.

Picture marked DEFENDANT'S EXHIBIT 1.

Q. Now, will you just step in front of the jury, Mr. Tuttle?

A. (Witness does so.)

Q. Now, did you say that all of you six or eight boys came over this plank?

A. I say that I did; I am not sure as to the rest.

Q. Isn't it a fact that a good many of them clambered over the railing?

A. If they did, I didn't know it.

Q. Would you say that they didn't or that they did?

A. They may have, I don't know whether they did or not.

Q. You walked across this plank and then walked out on this hood?

A. I walked across this plank and came out here.

Q. Was there anything to prevent you from stepping from this plank right up the stairs onto this deck?

A. Rather a difficult feat.

Q. Rather a difficult feat for a young man your age?

A. Well, rather inconvenient.

Q. Now, wasn't it a fact that you boys all jumped out on this covering and had a little lockstep?

A. No, we didn't.

Q. You were celebrating at the time the opening of the canal, were you not?

A. That was our purpose in coming to Lewiston.

Q. You came from Pullman?

A. Yes sir.

Q. And a great many other people came to Lewiston?

A. Yes sir.

Q. And you were celebrating that day, were you not?

A. That is what we came for, to help in the celebration.

Q. You mean to say that it was easier to walk out across this plank out on this hood and then step from the hood onto the stairs?

A. It was easier to step from the plank to the hood and from the hood to the stairs than to turn directly around and walk up there.

Q. Now, you were standing next to the stairs, you say?

A. As I remember it, I wasn't more than a foot from the stairs.

Q. Was there anyone between you and the stairs?

A. There was, as I remember, there was a woman going up the stairs.

Q. In fact, while you stood there she came across the plank and walked up the stairs?

A. No, I think she was preparing to go up already—I imagine she was on the wheel-house when I was coming across.

Q. Where were these other boys standing, along here on the center of the wheel house?

A. I was the first one across; I don't know just exactly where they were standing.

Q. You may take the chair.

A. (Witness does so.)

Q. Now, you say, that a few minutes or an hour or so you went back there to examine this place where Mr. Hutchison fell through?

A. After two or three hours I went back, yes.

Q. What tempted you to go back, what was your idea?

A. I wanted to look the matter over and see why it broke.

Q. Have you any reason why you should go back and examine that place?

A. Why, I of course was interested in it; I wanted to see what was the matter, why it went through.

Q. Did anybody tell you to go back?

A. No one told me to go back.

Q. Went back of your own accord?

A. Yes sir.

Q. Did you see Dr. Tifft there at the same time examining the wheel-house?

A. I didn't know Dr. Tifft at the time; I met him at the hotel that evening.

Q. Did you see anybody else back there examining it?

A. My father went back with me.

Q. And you went back of your own accord?

A. Yes sir.

Q. This accident happened about what time of day?

A. I don't remember just what the time was.

Q. Don't know whether it was forenoon or afternoon?

A. In the afternoon.

Q. In the afternoon, about what time?

A. I could not say exactly what time it was.

Q. Was it before or after the middle of the afternoon?

A. I should think it was about the middle of the afternoon, possibly a little before.

Q. How long after did you go back to examine this place that broke?

A. Two or three hours.

Q. I will hand you this picture and ask you whether you ever saw that stairway.

A. I saw that today, I think.

Q. Didn't see it on the day of the accident?

A. Yes, I saw it when I came back this iron stairway.

Q. When you went back to examine the boat?

A. Yes.

Q. You saw it then. Is that a correct representation of that stairway on the day that you went back there and examined—or substantially correct?

A. All but the sign, I don't remember of having seen the sign.

Q. You don't remember of seeing any sign?

A. Yes.

MR. SENN: We will offer it in evidence, Your Honor, if there is no objection.

COURT: Any objection?

MR. LANGLEY: No, we have no objection.

COURT: Very well, let it be offered. Does that purport to have a sign there?

MR. LANGLEY: Yes.

MR. SENN: With the exception of the sign.

Picture marked DEFENDANT'S EXHIBIT 2.

Q. Now, after you passed across the gang-plank did you go straight to the back end of the boat?

A. Yes, I went up the stairway to the next deck and from there to the back of the boat.

Q. Along which side of the boat did you go back, the right hand or the left hand?

A. The side near the shore.

Q. Which side was that, looking toward the bow?

A. The bow is the front of the boat?

Q. Yes, the bow is the front of the boat.

A. Looking toward the bow.

Q. Yes.

A. That would be the right side, looking toward the bow.

Q. Looking toward the bow. How many of the other boys went along that way or do you know which way they took?

A. We broke ranks when we got on the boat.

MR. SENN: That is all.

RE - DIRECT EXAMINATION.

Q. Do you know, Mr. Tuttle, whether or not the gentleman, Mr. Bostock, whose deposition has been read here, was on the boat at the time that this occurred or whether his testimony is directed to a previous trip of the boat?

A. I don't know whether he was on the boat at the time or not, but I merely saw him in the town.

Q. You merely saw him in the town?

A. In Lewiston that day.

Q. If he was on the covering of the water-wheel at the time that you members of the band were on the covering you don't know of it?

A. No.

Q. And would you have been likely to have seen him if he had been there at that time, do you think?

A. I think I would have directly afterwards. I saw most of the boys afterwards.

Q. Is he a member of your band?

A. No, he is not.

Q. Was he at that time or at any time?

A. No, he never was.

Q. Now, as I understand, Mr. Tuttle, you were about the first one to come on the covering of the water-wheel, of the band?

A. Yes.

Q. And as I understand you, there was a lady that was going up the stairs at that time?

A. That is my recollection.

Q. And was that your reason for not going up the stairs at that time?

A. That was why I was waiting, yes.

Q. And the others that came on behind you, those members of the band, which Mr. Hutchison was one, did they come on after the time that you had passed to the base of the stairs?

A. After the time I was on the wheel-house or the base of the stairs?

Q. Yes.

A. I think they must have, I was at the head.

Q. You are quite positive that you were the first one of the band boys to come onto the covering of the water-wheel?

A. I am quite sure of that, yes.

Q. And you would not be able to tell us how far back of those that were coming on, of the band boys, Mr. Hutchison was, would you?

A. No, I could not be positive of that.

Q. I believe you testified in your direct examination, Mr. Tuttle, that you were told to go to the upper or top deck; is that correct?

A. Yes, that is correct.

Q. Who told you that?

COURT: He has been over that.

MR. LANGLEY: That is all.

COURT: Can you point out on that picture the first one offered about where Hutchison fell through that deck?

MR. SENN: Defendant's Exhibit 1?

COURT: Yes.

A. I could judge only from the hole I saw afterwards.

COURT: Very well.

A. I should say about there.

COURT: Make a mark there, a cross with your initials.

A. (Witness does so.)

MR. LANGLEY: We would have gone into that, Your Honor, but the jury was given the place this morning.

COURT: Very well.

A. That in my estimation is about the place.

COURT: About how far away from the foot of the stairs?

A. That would be about three feet I imagine.

COURT: That is all; I wanted to know for my own information.

(Witness excused.)

PAUL H. DUPERTUIS, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Langley:

Where do you reside, Mr. Dupertuis?

A. Abner, Washington, at the present time. However, I am in Pullman.

Q. What are you doing at the present time?

A. I am a student at the college.

Q. What position in the student body do you occupy or have?

A. I am President of the associated students.

Q. What was it that you said?

A. President of the associated students.

Q. And where were you on May 3, 1915?

A. Lewiston, Idaho.

Q. What were you doing there?

A. I was a member of the college band.

Q. Were you aboard the boat J. N. Teal on May 3, 1915?

A. Yes sir.

Q. I wish you would tell the jury the manner in which you went aboard and what occurred up to the time of R. Verne Hutchison breaking through the covering of the water-wheel.

A. We went on board the ship over the gang plank in single file and climbed the steps to the second deck, walked back to the back of the boat and were going up on the third or top deck. We went over the banister, on the gang plank, onto the wheel-house; a lady was following me and there was a lady going up the stairs at the time, and we stepped to the side to let these people by. We had been on there only a few imnutes, perhaps a minute or two, when the crash came, and the roof of the wheel-house was torn from under us. I had one foot on the solid board, Mr. Hutchison, who was standing by my side, fell through, and my first thought was to grab him and I tried to catch him and at that time this lady who was following me was standing on this gang

plank, fell at my feet towards me, right towards the hole that was made and instinctively I grabbed her by the arm and threw myself onto the boat and took hold of the railing and held her until people on the boat pulled us up.

Q. Were there any notices about there not to go upon the covering of the water-wheel, or any notices of any sort?

A. I didn't see them.

Q. Did you examine the condition of the timber after the break?

A. Yes sir.

Q. State to the jury what condition you found that in.

A. The rafters, as I call them, were without question rotting, they were dark in color, the break was similar to a break in bark. It didn't splinter off as new timber does.

Q. Was there any guard there giving you a verbal warning not to go out there?

A. There was not.

Q. Was there anyone to tell you where to go or what deck to go to when you went aboard the boat?

A. The instructions to Mr. Tuttle, our leader, was to go up to the top deck.

Q. Did you hear that instruction?

A. He gave it to us.

Q. Have you been on the boat today?

A. Yes sir.

Q. State to the jury whether or not the iron ladder that leads from the second deck to the top deck

was on the same side of the boat that you were on or on the opposite side?

A. There was no ladder on the same side of the boat that we went on, it was on the opposite side as I noticed today.

Q. Do you know Mr. Bostock?

A. Yes sir, slightly.

Q. Was he on the covering of the water-wheel at the time that this trip was being made or started?

A. I didn't see Mr. Bostock on the boat at all.

Q. I wish you would state to the jury whether there was any tussling or jumping about the boat by anyone that was on there?

A. There wasn't any at all, we were a military band, under military orders and there was no tussling at all.

Q. I wish you would state what your reason was for not going up the ladder at the time that you went out on the plank?

MR. SENN: I object to that as irrelevant, immaterial and calling for the conclusion of the witness.

COURT: I will overrule the objection.

A. There was a lady going up the stairs and it was impossible to get up until she had gone. Then there was the lady following me and the natural thing for me to do was to let the lady get by first, and I waited my turn.

Q. And as I understand, Mr. Hutchison was standing by your side at the time?

A. Yes sir.

Q. How far back in the line do you think that you were, of the band boys that were getting on at that time?

A. About—perhaps fifth or sixth, somewhere in there, I can't say exactly; near the front, however.

Q. I wish you would state whether or not you saw the band that was previously on the boat come from the upper deck?

A. Yes, sir, I did.

Q. How did they descend?

A. Down the ladder over the wheel-house.

Q. I wish you would state to the jury whether there were chairs on the upper deck at the time that you were attempting to board?

A. There were, the band was all seated.

Q. I will ask you to state to the jury whether or not you saw a notice posted on the boat this morning?

A. Yes sir.

Q. Was that notice there May the 3rd, 1915?

A. I didn't see it.

MR. LANGLEY: I think that is all.

CROSS - EXAMINATION.

Questions by Mr. Senn:

You went on the covering of the wheel this morning?

A. Yes sir.

Q. And showed the jury where Mr. Hutchison was standing?

A. Yes sir.

Q. And that is correct as you showed the jury this morning?

A. Approximately, yes sir.

Q. Now, as I understand, Mr. Hutchison was about the farthest out on the wheel covering?

A. By my side, yes.

Q. One of your feet was on solid boards, I believe, or rafters?

A. It didn't feel very solid, but it held me.

Q. It held you?

A. Yes sir.

Q. From there on to the ladder it was solid?

A. Yes sir.

Q. Is that true?

A. Well, it broke down, but then it didn't go clear in.

Q. Well, from the place where you showed the jury this morning that your foot was, to the ladder, that part didn't break through?

A. It broke down, but it didn't break through.

Q. Strong enough to hold you, so that it kept you from going through?

A. If I had stayed, I would have fallen, because I did pitch as it broke down.

Q. Mr. Hutchinson was the only one that fell through, as I understand?

A. As far as I know.

Q. Now, how many other boys were out on this covering?

A. There were perhaps six or eight people.

Q. Mr. Bostock, where did you become acquainted with him?

A. At Pullman.

Q. Is he a college student there?

A. He was.

Q. Was a student at that time.

A. I am not sure, I don't know.

Q. You knew him at college?

A. Just passingly.

Q. Came over to Lewiston with you?

A. Yes.

Q. Do you know any of the other band boys?

A. Yes sir, I know the band boys.

Q. You heard his deposition in which he said he jumped up and down on this covering?

A. Yes sir.

Q. Did you see him do that?

A. No, sir.

Q. He knew all you boys?

A. Not all, I don't think.

Q. And of course you boys stayed together, you were celebrating?

A. He wasn't with us at all.

Q. He wasn't with you at all, who was he with?

A. I don't know.

Q. You say there were chairs on the hurricane deck for the band?

A. Yes sir.

Q. There were no chairs for anyone else, was there?

A. I don't know.

Q. You didn't see any other chairs for anyone else?

A. The band was all seated; I don't know whether other people were seated or not.

Q. Now, when you went onto the boat did you form on the bank?

A. Yes sir.

Q. All you boys from Pullman formed on the bank?

A. Yes sir.

Q. And you marched down to the gang plank?

A. Yes sir.

Q. And isn't it a fact that you rushed the gates at the head of the gang plank and knocked over the gates?

A. No, sir.

Q. It is not a fact?

A. It is not.

Q. Were there gates knocked over?

A. No sir, not by the band boys.

Q. Who knocked them over?

A. I didn't know that they were knocked over.

Q. Did you see them fall?

A. No, sir.

Q. Now, it wasn't necessary to step from the gang plank to the roof or the covering of the wheel in order to get to the upper deck?

A. It would be the natural thing to do.

Q. That is not the question; was it possible?

A. It might have been possible, turn a right angle and go up.

Q. You saw the jury go up this morning and the other people?

A. No.

Q. You didn't see them?

A. No, sir.

Q. You say it could be done or could not be done?

A. It could be done, but not the natural thing to do.

Q. The natural thing to do was to step eight or ten feet to the covering of the wheel as you did, and then walk up?

A. I didn't step for eight or ten feet.

Q. The distance you showed the jury this morning was about eight or ten feet.

A. No, sir.

Q. It wasn't? How many feet was it?

A. It wasn't more than four feet from where I was standing.

Q. You say it wasn't more than four feet?

A. Four feet.

Q. From the foot of the ladder where you showed the jury this morning Hutchinson went through?

A. As I judge, yes.

Q. That would be a little over one step?

A. It would be a long step for me, for you too.

Q. That is right. How far is the end of the gang plank from the first step of the ladder, as near as you can say?

A. Oh, I should judge eighteen inches.

Q. Then you have to step eighteen inches from the gang plank onto that ladder?

A. Approximately.

Q. And you say that would be a difficult and inconvenient and unnatural thing to do?

A. Yes, surely I do.

Q. Was it not apparent that this rounding roof was not intended or suitable as a deck for passengers?

A. Perhaps wasn't built for that purpose, but was being used by the management of the boat.

Q. You band boys were the first ones to go on that covering?

A. I don't know.

Q. You heard Mr. Tuttle's testimony in which he said he was the first one to step out?

A. First band boy?

Q. Yes.

A. Yes sir.

Q. And you stepped out with him?

A. But there were people going up the ladder when we got there.

Q. Yes, going up the ladder?

A. There was a man standing on the wheel house when we got there.

Q. Wasn't it apparent to you that that wasn't intended as a place for passengers to walk, that rounded, where you might slip off anyhow?

A. It was being used for that purpose that day.

Q. Wasn't it apparent that it wasn't built for that purpose?

A. Perhaps wasn't built for that purpose.

Q. Anybody could look at it and see that that

rounding roof wasn't built for the purpose of having people walk on it. Isn't that right?

A. Yes sir.

Q. And you didn't see any officer or any employe of the company there telling people to walk over that roof, did you?

A. No, sir.

Q. Nobody told you to go out onto that covering?

A. No, sir.

Q. You went out on your own accord?

A. Yes sir.

Q. Mr. Hutchinson went out on his own accord?

A. Yes sir.

Q. And the leader of your band went out on his own accord?

A. Yes sir.

Q. Had you been on the boat before, this time.

A. No, sir.

Q. Had the band taken any other trips, on any excursions?

A. No, sir.

MR. SENN: That is all.

(Witness excused.)

WILLIAM A. MOSS: Called as a witness on behalf of the plaintiff being first duly sworn, testified as follows.

DIRECT EXAMINATION.

Questions by Mr. Langley:

Q. Where do you reside, Mr. Moss?

A. At Payette, Idaho, is my residence.

Q. What are you doing at present?

A. I am a student at Washington State College, at Pullman, Washington.

Q. Were you a student at Washington State College, on May 3, 1915?

A. Yes sir, I was enrolled in the college at that time as a student.

Q. Were you in Lewiston, Idaho, May 3, 1915?

A. Yes sir.

Q. Did you go there with the state college band from Pullman, Washington?

A. Yes sir.

Q. Were you a member of the band at that time?

A. Yes sir.

Q. I wish you would state to the jury whether or not you were on the boat, J. N. Teal, May 3, 1915, and your manner of going on the boat; state what you had done and what you observed up to the time of R. Verne Hutchinson breaking through the covering of the water wheel?

A. The band boys had been on the bank, I was with the group of them, we formed a single line in order to pass on to the boat easiest, there was a crowd there waiting to get on the boat, and we formed in a single file so that was the only way we could stay together and get through and crowd and get onto the boat. And our leader, Mr. Tuttle, had the pass and was at the head of the line; he presented the pass and we were permitted to pass over the gang plank onto the boat. That was the bow of the boat, and as we passed onto the bow of the boat we passed onto

the stairs just at the left—it is on the right hand side of the boat toward the shore, as we passed to go up those stairs, the captain said, “Go to the upper deck, boys;” I presume he was the captain, he was the man standing on the front end of the boat. We passed on up the stairs onto the—what I would presume the passenger deck and passed back to the back end of the boat. At the back end of the boat I noticed there was a step ladder passing from the housing over wheel house, or over the wheel up to the upper deck, and there was six or eight of us fellows and we stepped over onto the housing from the gang plank, a little plank there, onto the housing, and there were a couple of ladies, as I remember it, one, I believe, was ascending the ladder and the other was with one of the band boys. Some of the fellows stepped aside in order to let these ladies go up first, and the rest of the boys followed suit and we stood there on the wheel house waiting until the ladder would be clear so that we could step up. There wasn’t room for more than one or two people on the ladder at a time conveniently. We just simply stepped out on this housing to wait for these people to go up, and we hadn’t been there more than about a minute when the thing just sunk and I jumped and grabbed the top of the roof, the roof, or it would be hurricane deck and swung myself in onto the boat.

Q. Now, I wish you would state whether or not there was any notice there not to go out on the covering of that water wheel?

A. No sir, I saw no notices whatever forbidding anyone going out onto the wheel housing.

Q. I wish you would state whether or not there was a guard stationed there ordering you not to go out on the covering of the water wheel?

A. No one said anything that I could hear about not going out on the wheel house and I didn't see anyone there for that purpose.

Q. Did you examine the break of the material where Mr. Hutchinson fell through after he had fallen through?

A. Yes sir.

Q. I wish you would state to the jury, what condition you found the timber in?

A. Well, the timber looked to me discolored and I would not judge it to be sound timber, it looked to me like it had been rotted out by the water. It was discolored nearly black, and the break seemed to be more or less square. That is, they were not splintered like an ordinary piece of sound timber would splinter, they were broken off square.

Q. I wish you would inform the jury whether or not you saw a band descend from that deck before you went aboard?

A. Yes sir, from the shore where we were standing we could see the boat as she came in to the shore and there was a band I remember them distinctly, they were in Indian costume, I believe they were Indians up on this hurricane deck, and I remember distinctly of seeing them descend down by this ladder

on the back end of the boat, descend down to the lower deck.

Q. I wish you would state to the jury whether there were chairs on the upper deck at the time you were attempting to go to the upper deck?

A. Yes sir, there were chairs there.

Q. How many chairs would you judge to be there?

A. At the time that I saw those chairs there, which was shortly after the accident occurred, I noticed that there were chairs there. I don't know just how many.

Q. I wish you would state to the jury, whether or not there was any scuffling or jumping or rowdyism among the boys or among the people that were on the covering of that water wheel.

A. To my knowledge there was none whatever.

Q. Do you know a man by the name of Bostock?

A. No sir, I don't remember the man; I don't believe I have ever met him.

Q. Now, were you on the boat today, Mr. Moss?

A. Yes sir.

Q. I wish you would state whether or not you went to the second deck on the side where the ladder runs to the upper or hurricane deck?

A. Yes sir.

Q. Now, did you understand me? I asked you the question whether or not you went on the boat on the side that the iron ladder is on?

A. Today?

Q. Well, no, not today, when you went aboard with the band?

A. No sir, we didn't; we went up on the side nearest the bank, there was no ladder on that side of the boat.

MR. LANGLEY: I think that is all, Mr. Moss.

CROSS EXAMINATION.

Questions by Mr. Senn:

Q. You saw no one around this ladder at the back or stern end of the boat, did you?

A. Why, there were a few—

Q. No employes, I mean, of the company.

A. Not that I noticed, no sir.

Q. No one told you to go out onto the covering of the wheel?

A. No sir, no one said to go out on the covering of the wheel.

Q. You went out of your own accord?

A. Yes sir, I went out, that was the only way to go up the ladder, was to go on it.

Q. Was it possible to step from that little plank board onto the ladder?

A. Yes sir.

Q. Go right on up.

A. Yes sir, I believe it would have been possible.

Q. You could have done that?

A. Yes sir.

Q. But instead of that you went out onto the roofing of this wheel?

A. Yes sir.

Q. Six or eight of you?

A. Yes sir, there was about that many there.

Q. And you remained there for about a minute or so?

A. Well, it was just about a minute.

Q. How many people passed up that ladder in the minute?

A. Well, there was, as I say, a couple of women going up and as I remember it, I don't know how many people went up that ladder during that time but I know that there were a few people in my way, that is, between me and the ladder, at the time I was standing on this housing, that is, I could not have walked right up the ladder easily, as there were a few people on the housing besides myself.

Q. No reason why you could not wait on the gang plank while the lady ahead of you got to the hurricane deck, was there?

A. No sir.

Q. You could have done that?

A. Yes sir.

Q. And the other boys could have done the same thing?

A. Yes sir.

Q. What did you boys do on the roofing there, chat together?

A. We were not there but just a minute, as I explained. We simply walked out on there, waiting for the other people to mount the ladder, presuming that it was absolutely safe and would bear our weight, having no fear at all but what it was meant for that purpose.

Q. Some six or eight of you did that?

A. Yes sir.

Q. Without any orders or instructions from anyone?

A. No, sir, no orders to go out on there at all.

Q. No—

A. But there was no way to get up the ladder without going out.

Q. You had no more orders to go out there than you did anywhere else?

A. The only orders we had to go any place on the boat was to go up on the upper deck.

Q. They didn't tell you what way to go or how to go?

A. No sir, we took the easiest means possible, the only way that appeared to go up there.

Q. Now, you say that some of the boys from Pullman had lady friends with them?

A. I believe there was one of the boys there that had a lady friend with him, yes sir.

Q. What kind of wood was it that covered this wheel?

A. You mean whether it was fir, pine or hemlock?

Q. Yes.

A. I am sure I could not say. It was in a rather discolored condition and I would not be able to judge as to what the nature was.

Q. You don't know whether it was fir or oak or hardwood or what it was?

A. I would not presume it was hardwood, I don't know.

Q. What were the sleepers made of, what kind of wood?

A. They appeared to be about the same, it was common lumber, some kind of lumber.

Q. When did you examine this place?

A. It was just after the accident had occurred. As I remember it, I came back from the boat in which I went to assist my friend who had gone overboard after Mr. Hutchinson's body.

Q. About how many hours was it?

A. Well, it wasn't more than an hour.

Q. Go back of your own accord to examine the place?

A. Yes sir.

Q. Go back alone?

A. I went back in company of the Assistant Chief of Police of Lewiston and one other gentleman who I presume was the—an officer on board the boat.

Q. Do you remember that officer's name?

A. No sir, I don't, but I remember his face, I remember seeing him down on the boat this morning; rather a tall gentleman and dark.

Q. You formed a single file on the bank?

A. Yes sir.

Q. How many of you students came over from Pullman?

A. Why, there was about—about thirty of us.

Q. Thirty of you?

A. In the band.

Q. And how many other students came?

A. I don't remember.

Q. How far is Pullman from Lewiston?

A. I don't know the exact distance. It is by railroad about sixty miles, I believe.

Q. You came over on the railroad?

A. Yes sir.

MR. SENN: That is all.

RE-DIRECT EXAMINATION.

Q. I will ask you just one question, Mr. Moss. I wish you would state to the jury whether or not it would be possible for you to turn at direct right angles when you had come out over the plank, to turn on to the steps leading up when there were other people going up the steps at the same time?

MR. SENN: If you Honor, please, we object to that as calling for a conclusion; the facts speak for themselves.

COURT: I think he need not answer the question; the jury understands the situation there.

(Witness excused.)

C. W. KING. Called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Langley:

Q. Where do you reside, Mr. King?

A. Seattle.

Q. Where were you May 3, 1915?

A. Lewiston.

Q. What were you doing there?

A. I was private in the band.

Q. Were you on the boat, J. N. Teal, May 3, 1915?

A. Yes sir.

Q. I wish you would describe to the jury the manner in which you went on the boat and the occurrence connected with the falling of Mr. R. Verne Hutchinson through the water wheel.

A. To begin a little farther back than the other three witnesses have, and that is when we were passing the ticket office of the company just before ascending—or descending the back to the boat, just as the boat landed we were up there by the ticket office ready to go down to the boat at that time, I distinctly remember of an official of the boat company, evidently connected with the ticket office standing out there just above us on the platform, and one of the boys asking what part of the boat we should go to, and he told us to go to the hurricane deck and take the place of the other band, whom I then particularly noticed, to see which way they came down from the hurricane deck; having some experience with boats in the lake at Seattle, I knew the hurricane deck was not used except excursions and so on, when it was the time to use it—

MR. SENN: If your Honor please, we object to the conversation as irrelevant and incompetent and not binding.

COURT: Unless it was with an officer of the boat.

MR. SENN: He would have to show his qualifications, that the officer had the right to bind the company, before he can testify.

COURT: Of course he would have to show his authority.

A. I believe I am unable to do that.

Q. You may proceed with the story from where you stopped.

A. I noticed to see which way this band came down from that deck and also the few passengers that were up there; I noticed they came over the back end of the hurricane deck, and go down those stairs onto the wheel house and step over the rail and onto the promenade deck and go down to the main deck and off. Therefore, when we formed in back of our leader, Mr. Tuttle, Captain Tuttle, with the pass when we went on board we turned sharply to our left, went up the stairway, the natural one to go, went back down that side, no other way for them to go up except that one we had noticed from the shore, and stepped over—now, I will be rather explicit here because this seems to be a little doubt about this—Mr. Tuttle was first, then I came along in the next five or six, I was along about in there we came right out on this ready to go up the stairs, there was a lady going up the stairs and we stepped out. There was a lady very nearly behind me, I believe she was just preceding Mr. Dupertius, maybe the lady was behind, common courtesy would intend for us to step aside and let the ladies go up—

MR. SENN: Just a minute, we object, your Honor, to the testimony.

COURT: That is a part of the *res gestae*. That is after you got outside on the wheel house?

A. Yes sir.

COURT: Very well, that is part of the *res gestae*.

A. That is permissible, is it?

COURT: Very well.

A. That was the natural thing for us to do, and that accounts for us being six or eight of us on the wheel house there waiting for the ladies to go up ahead of us, in which case we were waiting to proceed right on. Then the crash came.

Q. Now, what occurred following that, where were you standing when Mr. Hutchinson broke through?

A. I was standing beside him on the other side of Mr. Dupertius. Well, it was a rather lucky circumstance that I was able to get hold of the rail, I don't remember exactly how I did, it happened so quickly, but I eventually gained the rail and went over onto the deck with some idea of going forward and seeing—trying to catch sight of him if he came up on the under side; the sweep of the current would naturally carry him to the outer side of the boat, that side, I went through to that side and heard the cry "Man overboard" and looked back down the rail just in time to see him just disappearing under the water about fifteen feet upstream from me. I then went forward, expecting any second to hear three or four go in the water, expecting that, but went forward and took off my military coat that I had on, and shoes and went off the front end of the boat and I remember being surprised that there was nobody went in and I found out—

COURT: I think that is a matter of detail, not necessary to relate that.

A. That is what follows.

Q. I wish you would state, Mr. King, if you will, whether or not there was any rowdy condition among the boys there.

A. There was absolutely none, it was a military band.

Q. Were there any notices there that told you not to go out there?

A. I saw none.

Q. Were there any guards there telling you not to go out there?

A. I saw none.

Q. Did you examine the timber where the break was?

A. I didn't examine the timber where the break was, but I picked up timber that had fallen through the wheel, down the river about six hundred yards, that had gone on an island there.

Q. I wish you would state what the condition of that timber was?

A. On the under side, the timber that would be on the underside next in contact with the water, was blackened and in a decayed condition, and the timber where you got a cross section view of it was discolored, showing various degrees of deterioration, rather marked on the under side, and, as has been said before, the break was direct, not a splintered break like sound wood would break, but as a piece

of charred wood or bark would break, the break of decayed wood.

MR. LANGLEY: I think that is all, Mr. King.

CROSS EXAMINATION.

Questions by Mr. Senn:

Q. How old are you?

A. Twenty-one.

Q. You are going to Pullman College?

A. Yes sir.

Q. Pullman, Washington. You were one of the band boys?

A. Yes sir.

Q. What time did you go to Lewiston from Pullman?

A. On the morning train.

Q. What time did you leave Pullman?

A. I think that train came through Pullman seven o'clock, I would not be certain as to the train.

Q. That was an excursion train?

A. That was an excursion train, ran from Pullman, to Lewiston.

Q. How many students got on at Pullman?

A. The entire band of about thirty-five pieces, and a few other students, I don't remember how many.

Q. Mr. Bostock, did you know him?

A. I only know him just to speak to him that is all; I don't know him.

Q. He was a student there at the same time?

A. I don't know.

Q. You knew when you said you knew him to speak to?

A. He evidently resided in Pullman at that time; I don't know whether he was enrolled or not.

Q. Now, you spoke to him in Pullman?

A. Yes sir.

Q. You certainly know whether he was a student there?

A. No, not necessarily, there are several boys that are in Pullman are not students of the college.

Q. And you had talked to him several times?

A. I don't think so, I never talked to him.

Q. How many times had you spoken to him?

A. I may have spoken to him half a dozen times in the course of the semester previous or meeting him around in the campus.

Q. Meeting him around in the campus half a dozen times?

A. Possibly.

Q. Spoke to him that many times, possibly?

A. I should judge so, along with a thousand other students.

Q. You are not certain whether he was a student there or not?

A. No sir.

Q. What time of day was this accident?

A. Between half past three and twenty-five minutes. Why I happened to notice the time special—

Q. You looked?

A. I looked at the shore to settle a bet as to whether the boat would be on time or not.

Q. After the accident you went down the river six or seven hundred feet?

A. About five or six hundred yards?

Q. Five or six hundred yards?

A. Yes sir.

Q. That is about a third of a mile?

A. Yes sir.

Q. Saw a piece of lumber there?

A. That had drifted down, yes, sir.

Q. Of course you recognized it as a piece coming from the wheel?

A. The lumber had drifted with me all the way down the river. I naturally knew it came with me.

Q. You walked down and saw the lumber drift down the river at the same time?

A. No sir, I was in the river.

Q. How did you go down?

A. No sir, the current carried me down.

Q. You were in a boat?

A. No sir, I went off the front end in hopes of rescuing Mr. Hutchinson, if he would come up.

Q. Now, how many of you boys lined up on the bank?

A. Preparing to go on the boat before the accident?

Q. Yes.

A. All but four or five members of the band, that was about thirty, I should say.

Q. And where was it that you had this talk

with—that you say he was an officer of the company, about going on the hurricane deck?

A. That was about one hundred yards up from the boat, up near the ticket office there.

Q. In the city office?

A. No sir, dock office, evidently.

Q. One hundred yards.

A. One hundred yards up from the prow of the boat, where it was on the bank.

Q. And an officer told you there that he wanted you on the hurricane deck?

A. He didn't tell me personally, someone of the members of the band asked him what part of the boat we were expected to go on and he was standing up there in his shirt sleeves on a hot day right by the ticket window, that is the only reason I knew he was an officer of the company, told us to take the place of the other band on the hurricane deck.

Q. Did you ever see the man before?

A. No sir.

Q. Could you see the boat from that place?

A. Yes sir.

Q. Did you get your pass at that place?

A. I don't know where the pass was obtained. I had nothing to do with that. I was simply a private in the band, the captain had that to attend to.

Q. You don't know where he secured the pass to go on the boat?

A. I found out later.

Q. Now, as I understand, after you got on the boat you went to the back end of the boat?

A. Yes sir.

Q. All of you happened to pass on the same side of the boat going back?

A. Natural for a military organization to stay together when they are directed to go to one place.

Q. You all went on the left side of the boat going back?

A. No sir, the starboard side, right hand side, it was our left hand side because we were headed toward the stern.

Q. You got on the bow of the boat?

A. Yes sir.

Q. And you walked back on the right hand side?

A. Starboard side of the boat, yes sir.

Q. You got on the bow of the boat and walked on the right hand side?

A. On your left hand side, because we were facing the stern.

Q. Then it was the left hand side of the boat going toward the stern?

A. Yes sir.

Q. How many of you went back there together?

A. All of us of the band.

Q. You all went in a bunch?

A. We went in single file. I believe that some of the rear half of the band may have been split up somewhat by the crush of passengers on the boat. It was rather impossible and it would have been rather rough to have held together when we had to pass through the crowd like that, of course we naturally would separate a little bit.

Q. Of course, military tactics, you would all have have to go together, that would be the rule, wouldn't it, with a military band?

A. That would be, as nearly as possible in accordance with politeness.

Q. You would not be able to split up and still follow out the military rule, would you?

A. I believe so.

Q. You would all have to follow each other and in file, all according to military rule?

A. Not necessarily, no sir.

Q. Now that Pullman there is not a military school, is it?

A. The military side of the school is.

Q. What is that?

A. The military end of the school; the school is not a military school, but we have enforced drill there by the United States government; we are members of the National Guard.

Q. A state school, are you not?

A. Yes sir.

Q. State agriculture?

A. The agricultural school is one of the colleges in the college.

Q. What is it?

A. The agricultural school is one of the colleges in the college, among others.

Q. It is known as the Washington State Agricultural School, is it not?

A. No sir, until 1903 it was known as the Wash-

ington Agricultural College; now it is the Washington State College.

Q. It is commonly known as the agricultural college in the State of Washington?

A. It is the only agricultural college in the State of Washington, yes sir.

Q. Now, you went back to the back end, how many of you would you say?

A. Oh, about thirty.

Q. Each of you went to the back end, all in single file?

A. Yes sir.

Q. Did any of you climb over the railing or did you all go over this plank walk?

A. I could not say as to that. I should judge that we didn't all go over the plank as it looked it wasn't necessary. The plank was there for the convenience, possible of ladies, to whom that step would have been—a step of two feet there would have been a little bit more than convenience would permit.

Q. You climbed over the railing onto the covering of the wheel?

A. Had to climb over the railing to get on the plank.

Q. Didn't some of you climb over the railing and get on the covering of the wheel?

A. I could not say as to that.

Q. You would not say that you didn't, would you?

A. I would say that I didn't, because I went over the plank.

Q. Now, isn't it a fact that you boys were anxious

to get out on the covering of the wheel, on the hurricane deck, that you went out over the rail, didn't wait for any plank, to walk on, you went over the rail?

A. I don't know as to what the rest of them did, but I didn't myself, because it happened to be natural for me where I was standing to go over the plank.

Q. Who went first among the boys?

A. Captain Tuttle.

Q. And he took his position out on the covering of the wheel?

A. Yes sir, knowing that there was a lady behind us, we stepped aside to wait for her to get up.

Q. He took the lead, didn't he, of these thirty boys?

A. Yes sir.

Q. You were all in line?

A. Yes sir.

Q. How far back was this lady?

A. She came on to the plank after possibly five or six boys had gone on.

Q. Crowded in between the files of you boys?

A. I should judge she did.

Q. You should judge she did?

A. Yes sir, I would judge she would not have to crowd through.

Q. Now, Captain Tuttle, as you say, was in the lead, and then came about five or six of you boys, and then came this lady?

A. Yes sir.

Q. And Captain Tuttle saw this lady back here about five or six, and seeing her he walked out on

the covering of the wheel and all the rest of you followed suit so that she could go up the stairs.

A. I don't know what Captain Tuttle's reason was.

Q. What is it?

A. I don't know what his precise reasoning was for doing that, but I should judge he knew there was ladies—people—at least there was a lady on the ladder going up and it was impossible for him to go on the ladder while she was there.

Q. Couldn't he follow her, she was going right up the ladder?

A. He would have had to wait.

Q. And you didn't want to wait; is that it?

A. I don't know whether that would be it or not.

Q. You had to wait out on the covering of the wheel, didn't you? Isn't that right?

A. Well, I don't know where else we could have waited.

Q. How long did you stay on the covering of the wheel before the accident?

A. Less than a minute.

MR. SENN: That is all.

(Witness excused.)

MR. LANGLEY: I think that it may be necessary for us to show the expectancy of the life of the boy who has lost his life. They have denied that. Would you be agreeable to stipulate that?

MR. SENN: Whatever it is then. You say it is—

MR. LANGLEY: Thirty-nine years.

COURT: Have you the tables here?

MR. LANGLEY: Yes.

COURT: Very well, the court will take your word for it.

MR. SENN: If you say that is it.

MR. LANGLEY: It is stipulated that the expectancy of R. Verne Hutchinson is thirty-nine years. Then, as I understand, it will not be necessary for us to introduce the statutes of the State of Idaho; the court will take judicial notice of the state statutes?

COURT: Ordinarily he will. If you have the statute here you might introduce it.

MR. LANGLEY: I haven't the statute here, I have it as it appears in Tiffany on Wrongful Acts, and it is the same now.

COURT: I suppose that is authoritative. If it is, it may be introduced.

MR. SENN: If you will let me see it. I think I remember the statute. Yes, that is it.

COURT: Very well.

MR. LANGLEY: I haven't the statute, if Your Honor pleases, of descent here in this, but the mother is the legal heir under the statute of distribution in the State of Idaho. I suppose the court will take judicial knowledge of that.

COURT: She is the only heir?

MR. LANGLEY: She is the only heir under the statute in the State of Idaho.

COURT: Is that admitted?

MR. SENN: I am not sure of that, Your Honor. I remember reading an Idaho case—

COURT: That is a question of law and you can look into that.

MR. SENN: Possibly we can look into that by morning.

COURT: Yes, very well.

MR. LANGLEY: Now, there is only one other matter I would like to, if Your Honor will permit me to—to read this section into the record.

COURT: Very well.

MR. LANGLEY: (reading) “Section 4100: When the death of a person not being a minor is caused by the wrongful act of neglect of another, his heirs or personal representatives may maintain an action for damage against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section such damages may be given as under all of the circumstances of the case may be just.” There is only one other bit of evidence that I would like to introduce, and I want to ask Your Honor whether Your Honor considers that admissible or not. As we will indicate to the court from a decision of the State of Idaho, the measure of damages is the loss of the comforts of the society and the companionship and the intelligence of the deceased person is an element of the measure of damages. Now, I think it would be competent to go before this jury to have the picture of the deceased boy before them, that they may read from the picture as much of the index of the character from the picture as the picture

will give them. And I wanted to call the sister of the deceased boy to identify the picture. I ask the court as to what the court's view is because I did that once and it was ruled out, under the measure of damages of this state, and I was afterwards accused of having called one of the relatives for the purpose of using it as sympathy and I don't want that in this case, and I would like to have Your Honor's view on that before I attempt it.

COURT: Do you object to it?

MR. SENN: The only claim we make, Your Honor, our contention is that for the pecuniary loss, which is the measure of damages in this case and the only thing to be considered would be, if it came to that point, the pecuniary loss which the plaintiff has suffered by reason of this death. The question of loss of society and matters of that kind have no—would not be admissable, consequently we think that this testimony would be inadmissible.

COURT: I don't know what the rule is in Idaho as to the measure of damages in a case like this. The sole heir is suing, and she is at the same time the mother. While it has been running in my mind as to whether the measure of damages would be the loss of society, or whether it would be the loss that would accrue to the estate of the deceased.

(Argument.)

COURT: Have you any further remarks?

MR. SENN: Nothing, Your Honor.

COURT: Do you still object to the picture being offered?

MR. SENN: Yes.

COURT: I think I will sustain the objection, because the intelligence can be told by word of mouth as well as it could be shown by the picture, and I think the oral evidence is better than the picture.

MR. LANGLEY: I have just the deposition, then, of the mother. This is the deposition of Ella A. Hutchinson, the plaintiff in the case. (Reading): * * * Q. What, if any, degree of affection existed upon the part of R. Verne Hutchinson for yourself, and upon your part for your son, R. Verne Hutchinson?

MR. SENN: We will object to that as irrelevant, incompetent and immaterial and not a measure for damages—not an element.

COURT: I will overrule that objection, I think that is proper.

MR. SENN: Save an exception. . .

COURT: Very well, you will be allowed an exception.

MR. LANGLEY: (Finishes reading deposition) That is our case, Your Honor.

PLAINTIFF RESTS.

Adjourned to April 22, 1916, at 10 o'clock A. M.

Portland, Oregon, April 21, 1916, 2 P. M.

MR. LANGLEY: I wish to introduce the deposition of Mrs. Tifft. (Reads deposition of Laura E. Tifft, as follows:)

“Q. State you name, age and place of residence.

A. Laura E. Tifft, age 42 years, Colfax, Washington.

Q. Were you aboard the Steamer 'J. N. Teal' May 3, 1915?

A. I was.

Q. If your answer be in the affirmative, state where you went aboard.

A. Lewiston, Idaho.

Q. Had you paid for transportation?

A. Yes.

Q. At the time Mr. Hutchison broke through the covering of the water-wheel of boat 'J. N. Teal' did you hear a cry of 'Man overboard?'

A. I did.

Q. If your last answer be in the affirmative, state where you were at the time?

A. I was about the middle of one side of the boat, on cabin or main passenger deck.

Q. State, if you know, what means, if any, were provided on the boat to reach the upper or hurricane deck from the stern or water-wheel of the boat.

A. A board from the railing to the wheel-house covering and from there steps led to the hurricane deck.

Q. Where had you been on the boat, from coming aboard to the time when you heard the cry of 'Man overboard?'

A. I followed the band to the stern of the boat, and then started with Dr. Tifft towards the bow of the boat.

Q. About how long after your coming aboard

was it, before you heard the cry of 'Man overboard?'

A. About five or six minutes.

Q. Did this occur before the trip of the boat was started?

A. Yes.

Q. Did you see any persons on the water-wheel covering?

A. Yes, I did.

Q. I hand you a picture marked for identification 'S. R. C.' and ask you whether or not to the extent of the picture this picture represents the physical conditions of the boat 'J. N. Teal' in every detail and particular, as the same existed at the time above referred to.

A. That is the way it looked to me."

MR. LANGLEY: I have the picture here and I would like to introduce it in evidence.

Picture marked Plaintiff's Exhibit 1.

MR. LANGLEY: Gentlemen, you can pass that along.

MR. SENN: Just a minute, I understand the offer is merely for identification.

MR. LANGLEY: I will offer it in evidence.

MR. SENN: Is there anything, Mr. Langley, as to when this picture was taken? Do you know when it was taken?

MR. LANGLEY: I could tell when it was taken, but I don't understand that that would be necessary for the purpose of introducing it in evidence, so long as it shows the condition that existed at that time.

COURT: Who took the picture?

MR. LANGLEY: The picture was taken by a young gentleman in Endicott, I think a day or two following this occurrence. The question that I have asked the lady is this: "I hand you a picture marked for identification 'S. R. C.' and ask you whether or not to the extent of the picture this picture represents the physical conditions of the boat J. N. Teal in every detail and particular as the same existed." She has previously testified that she was there at the stern of the boat at the time of the cry of "Man overboard."

COURT: You say this picture was taken a day or two after?

MR. LANGLEY: It was taken a day or two after, but I am saying that that picture shows the condition that existed at that particular time. I could not bring the photographer here.

COURT: Let me see the picture.

MR. SENN: I don't believe we will object to it, Your Honor.

COURT: Very well, let it go in. Let me see it. (Inspects picture.)

MR. LANGLEY: Gentlemen, you can just pass that along and look at it. (Continues reading.) "Mark on the picture with the letter 'L' the farthest point you may have reached toward the upper or hurricane deck.

A.

Q. State whether or not there were notices posted near the water-wheel of said boat, or on said boat at all, giving a warning not to go out on the

covering of the water-wheel, or not to go to the upper hurricane deck, or not to use the stairs leading from the covering of the water-wheel to the upper or hurricane deck of said boat or any notices of any kind, character or nature whatsoever which had to do with the use of the stairs leading from the covering of the water-wheel to the upper or hurricane deck.

A. I didn't see any.

Q. State whether or not you were verbally warned not to go upon the covering of the water wheel, or not to go to the upper or hurricane deck of said boat, or not to use the stairs leading from the covering of water wheel to upper deck, or given any verbal warning of any kind, character or nature.

A. I was not.

MR. SENN: That was objected to, Your Honor, and I think the objection might be well taken on this ground, as I understand this lady did not go to the hurricane deck, did not attempt to go to the hurricane deck, she was simply one of the passengers of three hundred or three hundred fifty, and I think the fact that she didn't try to go there, made no effort to go there, that she was not told not to go there would not be any evidence in this case.

COURT: She was one of the passengers on the deck?

MR. SENN: Yes.

COURT: She was on the passenger deck?

MR. SENN: She was on the passenger deck, but

as I understand made no effort to go to the hurricane deck.

COURT: I understand, but she was there. I think I will admit the testimony.

MR. LANGLEY: That completes the deposition of Mrs. Tifft. I introduce in evidence the deposition of G. V. Barker. (Reads deposition of G. V. Barker, as follows):

Q. State your name, age, residence and occupation.

A. G. V. Barker, 42 years, Orofino, Clearwater County, Idaho, photographer.

Q. I hand you a picture marked for identification 'H. L. W. No. 1' and ask you if you are the photographer who took the same.

A. Yes.

Q. If your answer be that you are, state what date the time of day and where the same was taken.

A. May 2nd, 1915, about 2:30 P. M. Taken at Captain John's landing on Snake River, above Lewiston, Idaho.

Q. Is the boat shown in the picture, the steamer known as the 'J. N. Teal?'

A. Yes.

Q. Is the picture a true likeness of the physical conditions existing at the time of the taking of the same?

A. Yes.

Q. I hand you a picture marked for identification 'H. L. W. No. 2.' First, however, I wish to offer the first picture, No. 1, in evidence.

COURT: Very well.

MR. SENN: We will object to that picture, Your Honor, as I understand in the deposition it wasn't offered in evidence, merely marked for identification. I think at the time of the taking of the deposition they should have offered it in evidence and without introduced at that time they cannot introduce it now. Second, that this appears to be a picture taken the day before the accident, when the conditions might not have been the same, or are different, and I think for that reason it would not be admissible.

COURT: I presume it is to show the matter of the boat; that is, the construction and form of the boat; is that what it is introduced for?

MR. SENN: It does not show that at all.

MR. LANGLEY: It is not for that purpose.

COURT: I will sustain the objection.

MR. LANGLEY: That is all.

MR. SENN: We raise the same objection to this picture. The same thing.

MR. LANGLEY: That is all of that deposition. The deposition of Dell Wilson. (Reads deposition of Dell Wilson, as follows:) "State your name, age, and place of residence.

A. Dell Wilson, aged 38 years, 111 State Street, Pullman, Whitman County, Washington.

Q. Were you aboard the Steamer 'J. N. Teal' May 3, 1915?

A. Yes.

Q. If your answer be that you were, state whether or not any one accompanied you.

A. Yes, I had my wife and little girl, and I sat there and talked with a couple of fellows before we went up on the top.

Q. If your answer be that there were persons accompanied you in going aboard, state who the persons were.

A. Besides my wife and little girl, I talked with Will Struppler and Ray Walker and Mr. E. W. Downen on top.

Q. What was your purpose and that of your wife and daughter in being aboard said steamer?

A. We went on board for the excursion trip.

Q. Were you or your wife or daughter employed by the boat owners or in the service of said boat?

A. No.

Q. If you state you and those accompanying you were aboard at the time above mentioned, and not in the service of the boat and were taking a river ride, state at what place you boarded the boat, and to what place you traveled.

A. We got on just above the bridge there on the Lewiston side. We went up to Asotin, Washington, and back.

Q. Did you pay a fare for transportation?

A. We paid a fare.

Q. About what time of day was the trip started and completed?

A. We started around one o'clock or after one o'clock and we were about an hour making the trip.

Q. State if you know whether or not the trip you made on Steamer 'J. N. Teal' was a previous

trip of the boat than the trip about to be started when a Mr. Hutchinson fell through the water wheel covering of said boat.

A. It was.

Q. State whether or not on this trip you were on the hurricane deck of the boat.

A. Yes, we were.

MR. SENN: Just a minute, Your Honor, we will object to that as irrevelant, immaterial and incompetent. It may have happened on any other trip not in evidence.

COURT: This is a previous trip?

MR. LANGLEY: This is a previous trip, and I am introducing this to cover exactly the same point that I was introducing the photographs for, to show what the custom and practice was of the passengers of going to the hurricane deck and that it serves the purpose of showing that the defense must have had notice that the upper deck was being occupied by passengers.

COURT: You are trying to show further here that there was no notice.

MR. LANGLEY: I beg your pardon.

COURT: You are trying to show further here that there was no notice.

MR. LANGLEY: Yes.

COURT: On that particular day. Special notice ought to be applied to the day of the accident.

MR. LANGLEY: If Your Honor understands me, I don't mean by that that I am attempting to

say that there was posted notice, by the deposition; that is not the purpose of this deposition.

COURT: I think you can show the custom or practice of going to the upper deck; I will permit you to do than, but I don't think you ought to show notice on that day. Notice should have been given on another day, so far as this accident—

MR. LANGLEY: The remark that I made of notice, perhaps the Court misunderstood what I mean by that; I mean that that would be notice to the defense that there were passengers going to the upper deck; that is the question I referred to.

COURT: Read that question again.

MR. LANGLEY (Continues reading deposition):
“State whether or not on this trip you were on the hurricane deck of the boat.

A. Yes, we were.

Q. State whether or not your wife and daughter were on the hurricane deck of this boat on the trip?

A. Yes, they were.

Q. If your answer is that you and your wife and daughter were on the hurricane deck of this boat on the trip above referred to; state by what stairs, if any, you and your wife and daughter ascended to the hurricane deck.

A. We went up by the stairs over the water-house.

Q. If you testify that you and those accompanying you had ascended by the stairs leading from the covering of the water-wheel to the hurricane deck state whether or not you saw other persons

than those engaged in the service of the boat using the same stairs as a means of ascent to the hurricane deck.

A. I did; I saw women and band boys, and men, too, that I don't think were employed by the boat.

Q. If you testify that you saw other persons than those engaged in the service of the boat using the stairs, state about how many?

A. I would say a dozen or fifteen before I went up, besides the number that went up afterwards.

Q. State whether or not you saw other persons than your wife and daughter upon the hurricane deck of the boat on this trip?

A. I did.

Q. If your answer be that you did see other persons than those mentioned, state about how many persons you saw on the hurricane deck?

A. In the neighborhood of thirty or forty."

MR. SENN: Just a minute, Your Honor, those are all objected to; I would like to get the ruling of the Court.

COURT: The ruling of the Court will be that the objection will be overruled.

MR. SENN: Exception allowed?

COURT: Yes, you have an exception.

MR. SENN: To all these?

COURT: Yes.

MR. LANGLEY (continues reading): "State whether or not there were notices posted—"

COURT: Before you read the answer—

MR. LANGLEY: "—near the water-wheel of

said boat or on said boat at all, giving warning not to go out on the covering of the water-wheel, or not to go to the hurricane deck, or not to use the stairs leading from the covering of the water-wheel to the upper or hurricane deck of said boat, or any notices of any kind, character or nature, whatsoever, which had to, or referred to the use of the stairs from the covering of the water-wheel to the upper or hurricane deck.”

COURT: I think you ought to confine that question to the day of the accident, or questions of that nature.

MR. LANGLEY: Does Your Honor understand that this was the same day?

COURT: I thought it was the day before.

MR. LANGLEY: No, this man was taking a ride the morning of the same day.

COURT: How long before the accident?

MR. LANGLEY: Well, I think that he could not have been more than an hour—I think the deposition will show.

COURT: I will hear the testimony then; I will overrule the objection.

MR. SENN: Not the same trip, Your Honor, a different trip.

COURT: Yes, I understand, it is so near the time I will permit that to go to the jury.

MR. LANGLEY (resumes reading):

“A. There was none that I saw near the water-wheel.

Q. If you have testified that you and those ac-

companying you were on the covering of the water-wheel of said boat for the purpose of ascending from the lower to the upper or hurricane deck, state whether or not you or those accompanying you were verbally warned not to go upon the covering of the water wheel, or not to go to the upper or hurricane deck of said boat, or not to use the stairs leading from the covering of the water-wheel to the upper or hurricane deck, or given any verbal warning of any kind, character or nature.

A. No, there was nobody gave us any warning or said a word to us about not going up.

Q. Did any member of the boat's crew aid passengers to ascend to the hurricane deck by way of the stairs leading from the wheel-house?

A. Yes.

MR. LANGLEY: I read the deposition of John Bostock. (Reads deposition as follows):

Q. State your name, age, place of residence, and occupation.

A. John Bostock, age 24, Roslyn, Wash.

Q. Were you aboard the steamer 'J. N. Teal' May 3, 1915, as a passenger?

A. Yes.

Q. If your last answer be in the affirmative, state whether or not this was on a previous trip of the boat, than the trip about to be started when a Mr. Hutchison fell through the water-wheel covering of said boat?

A. Yes.

Q. If your answer is that it was a previous trip,

state where from, and to what place, the trip was made.

A. Lewiston to Asotin.

Q. State if this trip was made May 3, 1915

A. Yes.

Q. State whether or not on this trip you were on the upper deck of the boat.

A. Yes, on the upper deck."

MR. SENN: I think, Your Honor, counsel ought to read the objections that are made as we go along, so that the record will show.

MR. LANGLEY: There are no objections here noted in this deposition at all; there was no objection.

MR. SENN: There were objections in all the other depositions that were not read by counsel.

COURT: There is no need to take up time of the Court in reading the objections unless you insist on the objections, and if you insist on the objections the Court will hear you.

MR. SENN: Yes.

MR. LANGLEY (continues reading): "If your answer is that you were on the upper deck of the boat on a previous trip on May 3, 1915, state by what stairs, if any, you ascended to the upper deck."

MR. SENN: Now, at this time I will object on the ground it is irrelevant, immaterial and incompetent.

COURT: The objection will be overruled. You may proceed.

MR. LANGLEY (continues reading):

“A. Over the wheel by stairs leading to upper deck.

Q. If you testify that you had ascended by stairs leading from the covering of the water-wheel to upper deck, state whether or not you saw other passengers using the same stairs, as a means of ascent to the upper deck.

A. There was more besides myself.

Q. If you testify you saw other passengers using the stairs, state about how many.

A. There was three that I know of.

Q. If you have testified that you were on the upper deck, May 3, 1915, state about how many persons were on the upper deck at the time.

A. The band was up there, and twenty others or more.

Q. State whether or not there were notices posted near the water-wheel of said boat, or on said boat at all, giving a warning not to go out on the covering of the water-wheel, or not to go on the upper deck, or not to use the stairs leading from the covering of the water-wheel to upper deck of said boat, or any notices of any kind, character or nature, whatsoever, which had to do with the use of the stairs leading from the covering of the water-wheel to the upper deck.

A. There was not any.

Q. If you have testified that you were on the covering of the water-wheel of said boat, state whether or not you were verbally warned not to go upon the covering of the water-wheel, or not to go

to the upper deck of said boat, or not to use the stairs, leading from the covering of the water-wheel to the upper deck, or given any verbal warning of any kind, character or nature.

A. I was on the—" There is just one word that I don't make out—it is not legible, I can't make out just one word, but it says "—and jumping on it, and there was no one warned us to keep off.

Q. State whether or not you heard any warning given to any person whomsoever, not to use said stairs leading from covering of water-wheel to upper deck of said boat, or not to go to the upper deck, or not to go upon the covering of said water-wheel, or any warning of any character, kind, or nature, which had to do with the going upon the water-wheel covering of said boat.

A. No."

MR. LANGLEY: The deposition of Gottfried Herbst. (Reads deposition as follows):

Q. State what, if any, position you held with the Washington State College Band, May 3, 1915?

A. I was leader of the band at that time.

Q. At what place were you with the band, May 3, 1915?

A. I was at Lewiston, Idaho.

Q. Was R. Verne Hutchison a member of the Washington State College Band, May 3, 1915?

A. Yes.

Q. Was Mr. Hutchison with the band at Lewiston, Idaho, May 3, 1915?

A. Yes.

Q. State whether or not the Washington State College Band, as an organization, was to be given a ride on the steamer 'J. N. Teal' May 3, 1915?

A. Yes, the College Band was invited to take a trip on the steamer—any steamer.

Q. Did Mr. Hutchison go aboard the steamer 'J. N. Teal' May 3, 1915, at Lewiston, Idaho, as a member of the band?

A. Yes.

Q. Was Mr. Hutchison in the employ or service of the boat at the time of the accident?

A. No, he was a guest.

Q. Was the band to play?

A. No, we were there without instruments.

Q. Did the members of the band have their instruments.

A. No.

Q. Were you aboard the steamer 'J. N. Teal' at Lewiston, Idaho, May 3, 1915?

A. No, not until about an hour after the accident to Mr. Hutchison.

A. If your answer be that you were, state whether or not this was before or after the accident to Mr. Hutchison.

A. After.

Q. State whether or not you were at the deck railing at the stern of the boat, on the deck immediately below the hurricane deck, and near the stairs leading from the water-wheel.

A. Yes.

Q. If you state you were, state how long it had

been after the drowning of Mr. Hutchison that you were at this place on said boat.

A. Perhaps about an hour.

Q. Did you look about this part of the boat for notices to passengers?

A. Yes.

Q. State whether there were notices posted near the water wheel of said boat, or on said boat at all, giving a warning not to go upon the covering of the water-wheel, or not to go to the upper or hurricane deck, or not to use the stairs leading from the covering of water-wheel to upper or hurricane deck of said boat, or any notices of any kind, character or nature whatsoever, which had to do with the use of the stairs leading from the covering of the water wheel to the upper or hurricane deck.

A. I saw nothing.

MR. LANGLEY: If you will refer back to the deposition of Mr. Bostock, the answer that I could not make out has since been deciphered and it says "I was on the covering and jumping on it, and there was no one warned us to keep off." The deposition of Miss Lowrey. (Reads deposition as follows):

Q. State your name, age, place of residence and occupation.

A. Mertico Lowrey, 21 years, Sandpond, Idaho, teacher.

Q. Were you aboard the steamer 'J. N. Teal' May 3, 1915?

A. I was.

Q. Did you pay a fare for transportation on said boat?

A. I did.

Q. If your answer be that you were aboard the steamer 'J. N. Teal' May 3, 1915, state where you went aboard?

A. At Lewiston, Idaho.

Q. Do you recall Mr. R. Verne Hutchison breaking through the covering of the water-wheel of said boat, May 3, 1915?

A. I saw him break through.

Q. If your last answer be in the affirmative, state what place you were at on the boat at the time.

A. I was on the upper deck near the stairs leading from the water-wheel to the upper deck.

Q. If your answer be that you were on the upper deck of the boat, state by what means you got from the lower to the upper deck.

A. By the stairs which were located on the covering of water-wheel leading to the upper deck.

Q. If you state you had ascended by stairs leading from the covering of water-wheel to the upper deck, how long had it been since you used the stairs, at the time you were informed there was a man overboard?

A. About three minutes.

Q. Were there other persons on the upper deck of the boat at the time you were there?

A. Yes.

Q. If so, about how many?

A. About eight or ten.

Q. State whether or not there were notices posted near the water-wheel of said boat, or on said boat at all, giving a warning not to go out on the covering of water wheel, or not to go to the upper deck or not to use the stairs leading from covering of water-wheel to upper deck of said boat, or any notices of any kind, character or nature, whatsoever, which had to do with the use of the stairs leading from the covering of the water-wheel to the upper or hurricane deck.

A. There was no notice near the water-wheel at all forbidding the use of the stairs to go on the upper deck. The only notice I saw was on the other end of the boat near the cabin which read: Passengers not allowed on upper deck.

Q. If you have testified that you were out on the covering of water-wheel of said boat, state whether or not you were verbally warned not to go upon the covering of water-wheel, or not to go to the upper deck of said boat or not to use the stairs leading from the covering of water-wheel to the upper or hurricane deck, or given any verbal warning of any kind, character, or nature.

A. No verbal warning of any kind was given to me.

Q. State whether or not you heard any warning given to any person whomsoever, not to use said stairs leading from covering of water-wheel to upper deck of said boat, or not to go to the upper or hurricane deck, or not to go upon the covering of said water-wheel, or any warning of any kind, char-

acter, or nature, which had to do with the going upon the water-wheel covering of said boat.

A. I never heard of any warning being given to anybody.’’

MR. LANGLEY: The deposition of Hazel Armstrong. (Reads deposition as follows):

“Q. State your name, age, place of residence and occupation.

A. Hazel Armstrong, age 21, Genesee, Idaho, public school teacher.

Q. Were you aboard the Steamer ‘J. N. Teal’ May 3, 1915, as a passenger?

A. Yes.

Q. If your last answer be in the affirmative, state where you went aboard.

A. Lewiston.

Q. Do you recall Mr. R. Verne Hutchison, breaking through the covering of the water-wheel of said boat May 3, 1915?

A. Yes.

Q. If your last answer be in the affirmative, state what place you were at on the boat at the time.

A. Upper deck.

Q. If your answer be that you were on the upper deck of the boat, state by what means you got from the lower to the upper deck.

A. By means of a small stairway or steps.

Q. If you state you had ascended by stairs leading from the covering of water-wheel to the upper deck, how long had it been since you used the stairs,

at the time you were informed there was a man over-board?

A. I had just reached the upper deck—probably a minute had elapsed.

Q. Were there other persons on the upper deck of the boat at the time you were there?

A. Yes.

Q. If so, about how many?

A. Three or four.

Q. State whether or not there were notices posted near the water-wheel of said boat, or on said boat at all, giving a warning not to go out on the covering of the water-wheel, or not to go to the upper deck, or not to use the stairs leading from covering of water-wheel to upper deck of said boat, or any notices of any kind, character or nature, whatsoever, which had to do with the use of the stairs leading from the covering of the water-wheel to the upper deck.

A. I saw no notices of the boat that warned the people not to go to the deck or use the stairs.

Q. If you have testified that you were on the covering of water-wheel of said boat, state whether or not you were verbally warned not to go upon the covering of the water wheel, or not to go to the upper deck of said boat, or not to use the stairs leading from the covering of water wheel to upper deck, or given any verbal warning of any kind, character or nature.

A. I was not warned not to use the stairs leading

to the upper deck, nor I didn't receive warning of any kind.

Q. State whether or not you heard any warning given to any person whomsoever, not to use said stairs leading from covering of water-wheel, to upper deck of said boat, or not to go to the upper deck, or not to go upon the covering of said water-wheel, or any warning of any kind, character, or nature, which had to do with the going upon the water-wheel covering of said boat.

A. I heard no warning given to anyone not to use the stairs leading from the wheel covering to the upper deck. I saw nor heard any warning given to any kind concerning the use of these stairs or the going upon the water-wheel."

MR. LANGLEY: The deposition of L. R. Stebbins. (Reads deposition as follows):

Q. State your name, age, place of residence, and occupation.

A. L. R. Stebbins, age 24 years; residence, Lewiston, Idaho; occupation, contractor.

Q. Were you aboard the Steamer 'J. N. Teal' May 3, 1915, as a passenger?

A. I was, and paid my fare to get aboard.

Q. If your last answer be in the affirmative, state where you went aboard.

A. At the Lewiston Boat Landing for passengers.

Q. Do you recall Mr. R. Verne Hutchison break-

ing through the covering of the water-wheel of said boat, May 3, 1915?

A. Yes, I recall the incident.

Q. If your last answer be in the affirmative, state what place you were at on the boat, at the time.

A. I was on the upper deck of said boat.

Q. If your answer be that you were on the upper deck of the boat, state by what means you got from the lower to the upper deck?

A. By the way of the wheel-house, and the stairs leading from the wheel-house to the upper deck.

Q. If you state you had ascended by stairs leading from the covering of the water-wheel to the upper deck, how long had it been since you used the stairs at the time you were informed there was a man overboard?

A. Within the range of thirty minutes.

Q. Were there other persons on the upper deck of the boat at the time you were there?

A. There was.

Q. If so, about how many?

A. About one dozen.

Q. State whether or not there were notices posted near the water-wheel of said boat, or on said boat at all, giving a warning not to go out on the covering of water-wheel, or not to go to the upper deck, or not to use the stairs leading from covering of water-wheel to upper deck of said boat, or any notice of any kind, character, or nature, whatsoever, which had to do with the use of the stairs leading from the covering of the water wheel to the upper deck.

A. I saw none.

Q. If you have testified that you were out on the covering of water-wheel of said boat, state whether or not you were verbally warned not to go upon the covering of the water-wheel, or not to go to the upper deck of said boat, or not to use the stairs leading from the covering of water-wheel to upper deck, or given any verbal warning of any kind, character, or nature.

A. The only warning I had was that there were no chairs for anyone except the band boys on the upper deck.

Q. State whether or not you heard any warning given to any person whomsoever, not to use said stairs leading from covering of water-wheel to upper deck of said boat, or not to go to the upper deck or not to go upon the covering of said water-wheel, or any warning of any kind, character, or nature.

A. I did not.

Q. Was the time of the facts to which you have testified the time when R. Verne Hutchison lost his life by drowning?

A. Yes.

Q. Were you on the upper deck at the time of the accident?

A. I was.

Q. What part of the boat do you mean by the upper deck?

A. The deck reached by the stairs leading upwards from the top of the wheel-house."

MR. LANGLEY: The deposition of Mrs. C. E. Stebbins. (Reads deposition as follows):

“Q. State your name, age, and place of residence.

A. Mrs. C. E. Stebbins, age 61 years; residence, Lewiston, Idaho.

Q. Were you aboard the Steamer ‘J. N. Teal’ May 3, 1915, as a passenger?

A. I was, and my son, L. R. Stebbins, paid my fare.

Q. If your last answer be in the affirmative, state where you went aboard.

A. At the Lewiston Boat Landing for passengers.

Q. Do you recall Mr. R. Verne Hutchison breaking through the covering of the water-wheel of said boat, May 3, 1915?

A. I do.

Q. If your last answer be in the affirmative, state what place you were at on the boat at the time.

A. I was on the upper deck, or top.

Q. If your answer be that you were on the upper deck of the boat, state by what means you got from the lower to the upper deck.

A. By way of the stairs.

Q. If you state you had ascended by stairs leading from the covering of water-wheel to the upper deck, how long had it been since you used the stairs, at the time you were informed there was a man overboard?

A. Just a short time.

Q. Were there other persons on the upper deck of the boat at the time you were there?

A. There was.

Q. If so, about how many?

A. I could not say; maybe a dozen.

Q. State whether or not there were notices posted near the water-wheel of said boat, or on said boat at all, giving a warning not to go out on the covering of water-wheel, or not to go to the upper deck, or not to use the stairs leading from covering of water-wheel to upper deck of said boat, or any notices of any kind, character, or nature, whatsoever, which had to do with the use of the stairs leading from the covering of the water-wheel to the upper deck.

A. I did not see any.

Q. If you have testified that you were out on the covering of water-wheel of said boat, state whether or not you were verbally warned not to go upon the covering of the water-wheel, or not to go to the upper deck of said boat, or not to use the stairs leading from the covering of water-wheel to upper deck, or given any verbal warning of any kind, character, or nature.

A. I was not.

Q. State whether or not you heard any warning given to any person whomsoever, not to use said stairs leading from covering of water-wheel to upper deck of said boat, or not to go to the upper deck, or not to go upon the covering of said water-wheel, or any warning of any kind, character, or nature,

which had to do with the going upon the water-wheel covering of said boat.

A. I did not.

Q. Was the time of the facts to which you have testified, the time when R. Verne Hutchison lost his life by drowning?

A. It was.

Q. Were you on the upper deck at the time of the accident?

A. I was.

Q. Do you mean by the upper deck the hurricane deck of the boat?

A. Yes.

Q. At which end of the boat were the stairs by which you ascended to this upper deck?

A. At the wheel-house.

Q. Did these stairs lead from the wheel-house?

A. They did."

MR. LANGLEY: The deposition of Dr. J. Floyd Tifft. (Reads deposition as follows):

"Q. State your name, age, place of residence, and profession.

A. Dr. J. Floyd Tifft, 37 years of age, Colfax, Washington, dentist.

Q. Have you been Mayor of Colfax, Washington?

A. Yes.

Q. Are you now President of the Commercial Club of Colfax, Washington?

A. I am not.

Q. Have you been President of the Commercial Club of Colfax, Washington?

A. I was last year.

Q. Were you aboard the Steamer 'J. N. Teal' May 3, 1915?

A. I was.

Q. If your answer be in the affirmative, state where you went aboard.

A. At the dock at Lewiston, Idaho.

Q. Had you paid for transportation?

A. I had.

Q. At the time that Mr. Hutchison broke through the covering of the water-wheel of the boat 'J. N. Teal' did you hear a cry of 'Man overboard?'

A. I did.

Q. If your last answer be in the affirmative, state where you were at the time?

A. On the side of the boat, walking towards the bow.

Q. State, if you know, what means, if any, were provided on the boat to reach the upper or hurricane deck from the stern or water-wheel of the boat.

A. A plank from the railing to the water-wheel covering and from there a ladder running up to the deck.

Q. Where had you been on the boat from coming aboard to the time when you heard the cry of 'Man overboard?'

A. Came on the boat, went first to the bow of the cabin or the main passenger deck, secured some seats or chairs and then went to look for my wife

and found her at the stern of the same deck trying to get up to the hurricane deck by the above described steps or ladder, then started for the seats at the bow.

Q. About how long after your coming aboard before you heard the cry of 'Man overboard?'

A. Probably from three to five, six or seven minutes.

Q. Did this occur before the trip of the boat was started?

A. Yes.

Q. If you have stated you were on the water-wheel covering after coming aboard, state what you were doing there, and whether or not Mrs. Tiffit was with you?

A. I was not on the water-wheel covering.

Q. Did you see others on the water-wheel covering?

A. Yes.

Q. I hand you a picture marked for identification 'S. R. S.' and ask you whether or not to the extent of the picture, this picture represents the physical conditions of the boat 'J. N. Teal' in every detail and particular, as the same existed at the time above referred to.

A. Yes, with the exception of the steps, which appear heavier."

MR. LANGLEY: I think that I will ask to offer that picture in evidence at this time. It is exactly the same picture as Mrs. Tiffit identified.

MR. SENN: No objection.

Picture marked Plaintiff's Exhibit 2.

MR. LANGLEY (continuing reading deposition of Dr. J. Floyd Tiff):

“Q. If your answer is not in the affirmative, explain any difference there may be, as between the conditions existing at the time of the accident, and as shown by the picture.

A. The steps appear heavier, perhaps due to what appears to be by this picture a cloth covering underneath.

Q. If you make any distinction, state whether or not the photograph is a complete likeness in every other particular.

A. Yes.

Q. Mark on the picture with the letter ‘T’ the farthest point you may have reached toward the upper or hurricane deck.

A.

Q. State whether or not there were notices posted near the water-wheel of said boat, or on said boat at all, giving a warning not to go out on the covering of the water-wheel or not to go to the upper or hurricane deck, or not to use the stairs leading from the covering of water-wheel to upper or hurricane deck, of said boat, or any notices of any kind, character, or nature, whatsoever, which had to do with the use of the stairs leading from the covering of the water-wheel to the upper deck.

A. I did not see any.

Q. State whether or not you looked for notices after Mr. Hutchison had broke through the covering of the water-wheel.

A. I did.

Q. If your answer be in the affirmative, state whether or not you found notices.

A. I did not.

Q. State whether or not you were verbally warned not to go upon the covering of the water-wheel, or not to go to the upper or hurricane deck of said boat, or not to use the stairs leading from the covering of water-wheel to upper deck, or given any verbal warning of any kind, character, or nature.

A. I was not.

Q. State whether or not you heard any warning given to any person whomsoever, not to use said stairs leading from covering of water-wheel to upper or hurricane deck of said boat, or not to go to the upper or hurricane deck, or not to go upon the covering of said water-wheel, or any warning of any kind, character, or nature, which had to do with the going upon the water-wheel covering of said boat.

A. I did not.

Q. State whether or not you saw the place where Mr. Hutchison broke through the covering of the water-wheel after he had broken through.

A. I did.

Q. If your answer be in the affirmative, state how long after he had broken through, that you saw the place.

A. It was probably from 15 to 25 minutes.

Q. State whether or not you made an examination of the circular supports of the wheel-house covering.

A. I did.

Q. If your answer be in the affirmative, state the condition of the same, as to whether or not the same were decayed, and if so, to what extent.

A. The stringers or circular supports toward the center of the wheel-house where they attached to the stern of the boat proper, were very rotten, one of them appearing to be entirely rotted off prior to the accident.

Q. State, if you know, the thickness of the covering of the water-wheel.

A. It is a trifle less than an inch.

Q. If the lumber covering the water-wheel has a designation as to character, and you know what it is, state what it is.

A. Flooring lumber.

Q. State, if you know, whether or not the supports of the covering of the water-wheel broke.

A. Yes, several of them, three, four or five."

MR. LANGLEY: I think that is all the depositions, with the exception of the deposition of plaintiff in the case, and that is quite lengthy. I assume that the jurors are tired of depositions and I would like to ask the privilege of introducing that later in the case.

MR. LANGLEY: I have just the deposition, then, of the mother. This is the deposition of Ella A. Hutchison, the plaintiff in the case. (Reads deposition of Ella A. Hutchison as follows):

“Q. What is your name, age and place of residence?

A. Ella A. Hutchison, age 59, Endicott, Wash.

Q. Are you the plaintiff in the case of Ella A. Hutchison vs. Willamette & Columbia River Towing Co., now pending in the District Court of the United States, for the District of Oregon?

A. Yes.

Q. Are you the mother of R. Verne Hutchison, deceased?

A. Yes.

Q. What was his age?

A. 24 years 8 months 18 days.

Q. Was he, or had he ever been married?

A. No.

Q. Is his father deceased?

A. Yes.

Q. When did his father die?

A. May 21, 1901.

Q. Did R. Verne Hutchison have adopted children?

A. No.

Q. Did R. Verne Hutchison leave a will?

A. No.

Q. Where did R. Verne Hutchison reside at the time of his death?

A. His home was Endicott, Washington, though

he was attending college at Pullman, Washington.

Q. State what educational attainments, if any, R. Verne Hutchison had.

A. He graduated from Endicott High School in May, 1909, taught one term in Endicott School; had completed the Freshman year in Washington State College and was just completing his Sophomore year in the same institution.

Q. Was R. Verne Hutchison attending college?

A. Yes, he was taking a course in Electrical Engineering in Washington State College at Pullman, Washington.

Q. If so, what particular studies was he pursuing?

A. Physics, calculus, machine design and shop work and English, besides vocal and instrumental music.

Q. Was R. Verne Hutchison industrious?

A. Yes.

Q. If your answer to the last question be affirmative, state his traits of industry, and what he may have accomplished by the exercise of his industry.

A. His habits of industry were such as to often call forth a protest, as he rose early and worked late while on the farm, and whether at work or study, he never left his task unfinished because it was a disagreeable one. He secured excellent grades in his college studies although my need of his services at home made it necessary for him to delay the beginning of his school work each year for several weeks after the opening of the school term. When

he came home, which was often, every week or two, he found something to work at for me nearly all the time he was with us.

Q. What, if any, degree of affection existed upon the part of R. Verne Hutchison for yourself, and upon your part for your son, R. Verne Hutchison?"

MR. SENN: We will object to that as irrelevant, incompetent and immaterial and not a measure of damages—not an element.

COURT: I will overrule that objection; I think that is proper.

MR. SENN: Save an exception.

COURT: Very well, you will be allowed an exception.

MR. LANGLEY (Continues reading deposition):

"A. There had always existed between us the strongest affection and my pride in him and in his abilities was very great, while his love for me was more than is often seen between mother and son. He always came and gave me a goodnight kiss and never to my recollection did he speak disrespectfully to me, but was always patient and kind, with a ready smile, and sympathy for anything that hurt or annoyed me.

Q. What, if any, care, society and comfort was given you by R. Verne Hutchison, deceased?

A. His care of me physically, mentally and financially was always his chief aim. His was the arm I leaned on many times while on the street and for months, while I was an invalid, he wheeled me about in a wheeled chair, seeming to take the great-

est pleasure in so making it possible for me to go to church and enjoy the out-of-doors and sunshine. He was quick to see that I had the best chair, the most comfortable place, and many times kept from me the things about our affairs that would have worried or harassed me, so that I might be more free from care. He gave up four years of his cherished ambition to go to college, in order to take entire charge of the farm for two years and to have charge of same in conjunction with his brother for two more years. He would always say when difficulties seemed to be too much for us: 'Never mind, Mamma, I will work as long as you need me; you needn't worry about financial matters.' He was as good as his word in that, for we depended on him for everything done on the farm. He worked as I said, early and late, often rising before daylight and riding out to the farm four miles to get his own breakfast, then work in the field all day. When I was able I went out with him, but he has stayed three months at a time, doing his own cooking and living there alone. He never asked wages, and did not receive any wages, except sometimes for a few weeks during the rush season, working the most of the year for nothing to keep things going. When he came home from college, which he often did, though there were games, or other things he would like very much to have attended he always came cheerfully and worked either at the garden or lawn in town, or went out to work at the farm. We depended on him to transact any business connected with the farm. His

taking away leaves us a household of women, a sad, broken household, where his name can scarcely be mentioned without tears. His memory comes near to be a benediction to all who knew him.”

Portland, Oregon, April 22, 1916, 10 A. M.

DEFENDANT'S CASE.

PETER MOHLER. Call as a witness in behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Senn:

Q. Now, Mr. Mohler, speak loud so that we can hear you. Where do you live?

A. I was born and raised in the western part of Ohio.

Q. How long have you been in Oregon?

A. I have been in Oregon since 1900.

Q. Speak a little louder, Mr. Mohler. How long have you been steamboating?

A. I first began steamboating in 1902.

Q. And since that time have you been engaged in that work more or less?

A. Yes sir.

Q. Were you working for the Willamette and Columbia River Towing Company on May 3, 1915?

A. Yes sir.

Q. In what capacity?

A. I was employed as a watchman on the Steamer Teal.

Q. On what steamer?

A. Teal—J. N. Teal.

Q. Were you on the boat at the time Mr. Hutchison was drowned?

A. Yes sir.

Q. What were you doing at that time?

A. I was watching the stairway leading from the promenade to the hurricane deck at the stern of the boat.

Q. Now, who did you take your orders from?

A. The first officer of the boat, the mate.

Q. You call him the mate?

A. The mate or the first officer, either one is proper.

Q. What orders had the mate given you in regard to this stairway?

A. To keep people off the promenade, or off the hurricane deck except the band, which would be seated up there after the boat left the landing.

Q. What were those orders, again?

A. To keep everybody off the hurricane deck except the band, which would be seated up there after the boat left the landing.

Q. What do you mean by after the boat left the landing—after it was loaded?

A. After it was loaded and got away from the landing.

Q. Now, did you see this accident?

A. Yes sir.

Q. Just state to the jury, what you saw and what happened.

A. Well, I had been placed there by the mate—

COURT: You will have to speak louder, you will have to raise your voice so the jurors can hear you.

A. Well, I had been placed there by the mate to keep the passengers and everybody else except the band, off the hurricane deck, the band would be seated after we left the landing and got out in the stream. There was a man and woman started up and I stopped him—the man was ahead, I stopped him perhaps on the second step from the bottom.

Q. Of what?

A. Of the steps going from the wheel house to the hurricane deck and the woman was at the bottom of the steps, perhaps had one foot on the steps and the other on the running board. These boys, college students, I understand, come up there with a rush, of course they could not take the plank on account of the man and woman being stopped there—they either climbed over the rail or jumped from the end of the plank that sets on the rail over on to the top of the wheel house—they came with a rush and of course the wheel house broke down and Mr. Hutchinson, I believe his name is, went through and was either killed by the accident, by the wheel, or drowned.

Q. How long had they been on the covering—on the roof before it went down?

A. Oh, not more than ten seconds, it went down almost instantly when they came out there.

Q. How many went onto the covering?

A. Seven or eight, I should judge.

Q. How were they dressed, in what kind of goods?

A. They were dressed in—I guess you would call it a light brown khaki.

Q. Did they have any instruments?

A. No.

Q. Did you know whether or not they were band boys?

A. No sir.

Q. Had you any way of telling whether they were?

A. No sir.

Q. Did you make any effort to keep them off the cover?

A. I didn't have a chance to, they came with a rush.

JUROR: Could I ask the gentleman where he was standing when this happened?

COURT: Yes.

JUROR: Where was you standing?

A. Right at the top of the steps.

JUROR: On the deck?

A. Yes.

JUROR: Up on the hurricane deck?

A. Yes sir.

Q. Now in regard to the sign being up there, was there a sign there by the stairs that sign there?

A. Yes sir.

Q. About people not coming up on the deck?

A. Yes sir.

Q. Was that there on the day of the accident?

A. It was there on the day of the accident.

MR. SENN: That is all; you may cross examine.

CROSS EXAMINATION.

Questions by Mr. Langley:

Q. Did I understand you, Mr. Mohler, to say that you expected the band to go to the hurricane deck after the boat had left?

A. Yes sir.

Q. What was your purpose in waiting until after the boat had left?

A. So the men that were looking after the crowd on the bow would be at liberty to come up on the deck and help handle it.

Q. Now, as I understand you to say, you were up on top of the hurricane deck yourself?

A. Yes sir.

Q. And your purpose in being there was to prevent people from coming to the hurricane deck, was it?

A. Yes sir.

Q. And did you see others on the hurricane deck at that time?

A. There was Mrs. Riggs, the captain's wife, and possibly Mrs. Fields, the chief engineer's wife.

Q. You are positive that they were the only people up there?

A. Yes sir, outside of perhaps—well there was the watchman at the forward ladder there was a watchman there.

Q. Do you know a man by the name of Stebbins living in Lewiston?

A. No sir.

Q. You don't know a lady by the name of Miss Lowry?

A. No sir.

Q. You don't know a gentleman by the name of Dell Wilson?

A. No sir.

Q. You don't know a lady by the name of Miss Armstrong?

A. No sir.

Q. You do know a lady by the name of Mrs. Stebbins?

A. No sir.

Q. Where are you employed at the present time?

A. On the Steamer Teal.

Q. On the Steamer J. N. Teal?

A. J. N. Teal, yes sir.

MR. LANGLEY: I think that is all.

(Witness excused.)

CHARLES E. STEELSMITH. Call as a witness on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Senn:

Q. Mr. Steelsmith, where do you live?

A. Portland, 795 Corbett Street.

Q. Talk loud, so His Honor and the Jury can hear you.

A. 795 Corbett Street, Portland.

Q. How long have you lived in Portland?

A. Twenty-five years.

Q. What is your business?

A. I am employed by the Willamette and Columbia River Towing Company in their passenger and freight.

Q. How long have you been working for the company?

A. Eleventh of August, 1915; no, 1914.

Q. Were you at Lewiston at the time of this accident?

A. Yes sir.

Q. What were you doing there?

A. I was up there as a representative of the company in looking after matters that might come up. Be on the ground.

Q. Now, just explain the occasion of the boat being up there.

A. The Steamer Teal was sent up there on a regular run in time to arrive there for the occasion of the Lewiston Celebration of the opening of the Celilo Canal. The Commercial Club of Lewiston had arranged for a series of excursions on that day, as a sort of diversion for the crowd that might be in the city, and they had arranged to have an excursion, or for a boat to leave the dock at one o'clock at three and at five, giving them parties a short ride. The one excursion had left the dock and returned—one excursion—one trip had been completed. In loading for the second trip the accident occurred.

Q. Now, who made this arrangement with you about making these trips?

A. The transportation committee of the Commercial Club of Lewiston.

Q. There has been a pass introduced in evidence here, by Potvin—or something like that.

A. Yes sir.

Q. Who is he?

A. He was secretary of the Commercial Club at that time or secretary of the transportation committee, I am not sure which.

Q. What arrangements were made about the band?

A. There were no arrangements made by us other than Mr. Potvin informing me in the morning that there would be a band for each trip, which was to furnish the music and they were to be passed free of charge and taken care of. And they were assigned by him or by some one not of the committee, I don't know who assigned them or who gave them a pass, that was simply the identification, as I take it, to show that they were the band to go.

Q. Now, you didn't see the accident?

A. No, I didn't see the accident.

Q. You don't know anything about how it happened except hearsay?

A. Only hearsay.

Q. Now, Mr. Steelsmith, where were you prior to the boat leaving on this second trip, and what were you doing there?

A. At the particular time when the boat landed,

the planks were put out and the gates put up and the crowd—I suppose there were perhaps two thousand people on the beach there, a big crowd of people, and at once when the planks were put out they closed up around the end of the planks and we opened—asked them to step aside that the people might get off that had made the trip. They did so and as the crowd came off and the last of the party were ashore they closed in on the planks again to go aboard, and I stood at the upper end of the planks and sort of let them—kept them in order—to keep them in order told them there was no hurry and to take their time to go aboard, and avoid the rush, the crowd.

Q. You were at the end of the plank that was on the shore?

A. Yes sir, I was standing on the beach.

Q. Just explain the nature of these planks, how wide they were and how long.

A. The jury walked—I would not say the identical planks, but similar, they are landing stages approximately four feet long and three feet and a half wide three feet wide, each.

Q. Like the jury walked over yesterday?

A. They walked over similar planks.

Q. Now, you spoke something of some gates, what do you mean by gates?

A. There was a gate set up on the outer side of each plank stock gates.

Q. How high are these gates?

A. They are like a panel of fence, probably twenty feet long and four feet and a half high.

Q. They are used as a sort of rail.

A. They are used on the boat for the purpose of fencing off stock, or in case of excursion, putting around the bow, or as the purpose was used there, for protection, a man stood at each end of them and held it up while the crowd passed between.

Q. Now, you were at the shore end of the gang plank as I understand, was there anyone at the boat end of the gang plank?

A. The mate and the purser.

Q. The mate and the purser?

A. Yes sir, they were there to take up tickets and count the passengers.

Q. How many passengers were you allowed on this trip?

A. We were allowed three hundred regular and a permit for fifty, made three hundred and fifty.

Q. Who gives you those permits—allowance?

A. The local inspectors.

Q. United States Government inspectors?

A. Yes sir.

Q. Now, in regard to these band boys or these boys that came down, just explain to the jury when you saw them on the bank, when they started?

A. Well, the first conversation that I had with the band was in regard to which band should go. There were apparently two bands there. The Pullman Band—I don't know their name, but they were understood to be the Pullman College Band; there was also the band in blue uniform known, I think, as the Whitman County Band, but our agent at the

ticket office called me to one side, saying that there seemed to be a mixup on the band question, which band was to go, and after the boat had left the first trip, he sold the tickets for the second trip up to three hundred, the people were clamoring for tickets, and to avoid the rush and enable us to get away quick, he sold the tickets for the second trip after the first trip. These boys were I should say, twenty-five or thirty of them. The two bands were arguing which band should go and I was called into the controversy and I said to them—the one that seemed to be the leaders, I said “Boys, it don’t make a bit of difference to us which one of you go, but the fact is we cannot take both of you for the reason we have sold too many tickets and we are only allowed 350 and have sold 300, and you say there is 35 or more in your organization, in each, so we can take only one of you, so you will have to decide which goes.” So they both argued, they had a concert at five o’clock and so on, which didn’t interest us, the facts were we couldn’t take but one band. I went back to the plank after this conversation with the boys and the crowd had got ashore and the others had started aboard. And about that time I saw some of the young fellows in blue uniform get into an automobile and start away and immediately the other crowd came down—down the incline or the bank, there is a sloping bank there. They came right through the crowd in a body, or in a bunch, and as they neared me I said to one young fellow who was there, I said “Well you decided to go, did you, boys?” and he said yes,

they did, and I called out to the mate and purser to pass the boys in khaki uniform, which they did as they went up the plank. As they came down this incline toward the end of the plank they came down there with a rush and the people that were between them and the end of the plank, some of them were still getting aboard and some were pressed to one side or the other, and I should there was probably eight or ten, maybe got by, and the rush—the gate toppled over and caused a commotion there and I reached through and got the man's hand on the other side and stopped him. I said "Boys, no occasion for this hurry, you have lots of time, you will have somebody in the river, you must be careful," and the gate was immediately straightened up and they proceeded—went up.

Q. Did they have their instruments with them?

A. No sir.

Q. You say there were probably two thousand people along the shore?

A. I should say there was that many sightseers, I don't know. I guess it was—an estimate.

MR. SENN: You may cross examine.

CROSS EXAMINATION.

Questions by Mr. Langley:

Q. I understood you to say that you are now in the employ of the Willamette and Columbia River Towing Company?

A. Yes sir.

MR. LANGLEY: I think that is all.
(Witness excused.)

ARTHUR DAVIS: A witness called on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by MR. SENN:

Q. What is your business, Mr. Davis?

A. River mate.

Q. Who are you working for at the present time?

A. The government employ at the present time.

Q. United States Government?

A. Yes sir.

Q. Were you working for the Willamette and Columbia River Towing Company at the time of this accident?

A. Yes sir.

Q. What was your position?

A. Mate of the J. N. Teal.

Q. Where were you stationed at the time that the people came across the gang plank onto the boat?

A. On the bow of the boat at the end of the planks.

Q. And what were you doing?

A. Counting the people as they came aboard, helping the purser take tickets.

Q. Who had you stationed at the stern of the boat near the stairway?

A. Mr. Mohler.

Q. Mr. Mohler also testified to a watchman being at the front stairway on the hurricane deck.

A. Yes, sir, a boy by the name of Charley Long. I don't know where he is now.

Q. Do you know whether he is in this country—Do you know whether he is around Portland?

A. He is like deck hands he drifts around—I could not say where he is, he may be in Seattle or Portland—I could not say.

Q. Where was he stationed?

A. At the port side.

Q. Is that the—that is near the captain's cabin at the front of the boat?

A. Yes sir.

Q. That you mean was when you passed on the right?

A. Yes sir.

Q. As I understand he was at that stairway?

A. Yes sir.

Q. You didn't see the accident?

A. No sir.

Q. Did you notice any commotion, or anything at the other end of the gang plank about the time the boys—

A. The gate started to fall over and I was kind of standing on the side and reached over and grabbed it and still counting and taking tickets. We got straightened up and I could not see anything but the band boys coming aboard. I asked them if they were band boys.

Q. Did these boys have any instruments?

A. No sir.

Q. How about the size of the crowd on the bank, was it small or large?

A. Large crowd.

Q. How long have you been steamboating?

A. About sixteen years.

MR. SENN: That is all.

CROSS EXAMINATION.

Questions by Mr. Langley:

Q. I don't know that I got your name.

A. Arthur Davis.

Q. You were the mate on the boat J. N. Teal on May 3, 1915?

A. Yes sir.

MR. LANGLEY: That is all.

(Witness excused.)

ARTHUR RIGGS. A witness called on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Senn:

Q. What is your business?

A. Master and pilot, inland steamers.

Q. And how long have you been a pilot?

A. I have been a pilot for about sixteen years.

Q. Pilot is about the same thing as captain on the boat?

A. Well, I had the pilot license before I was master's I had master's license about two years.

Q. How long have you been steamboating?

A. Twenty eight years about.

Q. Twenty eight years and for what companies have you—

A. Well, different companies most all of them on the Columbia and Willamette Rivers—Alaska.

Q. You have operated on the Willamette River a good deal?

A. Yes sir.

Q. Were you the captain or pilot of the J. N. Teal at the time of this accident?

A. Yes sir.

Q. Where did you take the boat from?

A. From Portland.

Q. When did you start?

A. From Portland, the Taylor Street dock.

Q. Now where—you didn't see this accident as I understand?

A. No sir.

Q. Where were you at the time?

A. In the pilot house.

Q. At the wheel of the boat?

A. Yes sir.

Q. Could you see the crowd on the bank?

A. Oh, yes, I could see the crowd on the bank.

Q. What size crowd was it—whether it was a large crowd or small crowd.

A. Oh it was a large crowd, I could not say how many.

Q. Where was Mr—whose duty is it to station watchmen—yourself or the mate's?

A. Well, it is the mate's duty through my orders.

Q. At the time of this accident, did you see anybody on the hurricane deck?

A. Well, I see the men that were assigned there and parties of the crew that were off duty—there were several of them.

Q. Where was your wife?

A. Sir?

Q. Where was your wife at that time?

A. I could not say.

Q. You didn't see her?

A. No I was busy in the pilot house.

Q. Now, Mr. Riggs, the covering of this wheel, what is its purpose to cover the wheel—what is the purpose of the covering of the wheel?

A. Well, it is for a good many purposes, for to help the looks of the boat some of them think, it doesn't protect the wheel itself more than an ornament than anything else.

Q. What is the main reason—about throwing the water on the boat?

A. It breaks the spray too, that is one purpose.

Q. To keep the water from being thrown up over the boat?

A. Yes that is one of the reasons.

Q. Was is ever built or constructed for the purpose of having anyone walk over it?

A. No sir.

Q. Did you ever see any passengers or anybody except employes on it?

A. Yes, I have seen them on there and chased them off of there a number of times.

Q. Now, how is it shaped, as to whether it is rounding or square?

A. Rounding.

Q. What is it constructed of, do you know?

A. Thin fir ceiling.

Q. What is it?

A. Thin fir, I should say half inch. I would not be positive as to that but it is very thin lumber.

Q. You never examined it closely?

A. No, not right closely.

Q. How long had you been running the J. N. Teal before the accident?

A. Well, I just took command that trip. I had been in command of the Steamer Inland Empire and I was called from Celilo to Portland to take charge of the Teal. I arrived in Portland and went right out on the Teal.

Q. Did you see these boys come aboard?

A. I seen them on the shore.

Q. How did they come down the gang plank?

A. Well, I could not say. I seen the rush and commotion out there and I seen Mr. Steelsmith with his back to the boat and his hands up this way, and he said, "take your time you will have plenty of time." That is about all I noticed there. I noticed the planks fall.

Q. Noticed what?

A. The planks fall or starting to fall.

Q. You mean the gates?

A. The gates, yes, I should say the gates.

MR. SENN: That is all.

MR. LANGLEY: That is all.

Questions by the Court:

Q. Did you have charge of that part of the boat where those boys got onto the wheel covering?

A. I have charge of the whole boat.

Q. You have charge of the entire boat?

A. Entire boat, yes sir.

Q. Was it your purpose on that day to keep people off that covering?

A. It was my purpose to have men there to do it.

Q. What is that?

A. It was my duty to have men assigned there.

Q. And there was a board put out for people to walk out to the foot of the ladder?

A. Oh, yes, there is a plank.

Q. And was that put out for the purpose.

A. Oh, no, it was permanent.

Q. That is a permanent board?

A. Yes, it is a permanent board.

Q. Was that put there—I mean for the people who went aboard the boat to use or was it put there for the officers.

A. It was put there to get to the life boats and the officers and crew. When they were allowed up there—I mean passengers when they were allowed up there, they would go that way. Yes sir.

Q. Then it was usual to allow passengers to go up that way to get on the hurricane deck?

A. When I seen fit, yes, when I seen fit and things were roped off proper for passengers could let as many as I seen fit.

Q. How did you rope off?

A. By stringing the line about the pilot house and around the hog posts and inside of the davits.

Q. Did you rope that off so that they could not get off?

A. Yes, out to the edge of the ladder.

Q. Was it roped off this day?

A. Yes sir.

COURT: That is all.

QUESTIONS BY MR. SENN:

Q. I will ask you whether the Government requires the stairway there?

A. Sir?

Q. Government regulations require a stairway?

A. Yes, they do.

Q. The purpose is to get to the life boats?

A. Yes sir.

Q. The fire drills?

A. And fire drills, yes sir.

CROSS EXAMINATION.

Questions by Mr. Langley:

Q. Now, you stated in reply to a question asked by the Judge, that it was roped off. I wish you would explain where it was roped off, where there was any ropes there.

A. The ropes were around the pilot house and to the hog posts right on around and take in the life

boats, and the band was supposed to be stationed, and was stationed right in between the life boats—the life boats were on the outside.

JUROR: Just what do you mean by the life boats?

Q. Let's get that clear. That roping off was on the upper deck, was it not?

A. Yes sir.

Q. It had nothing at all to do with the covering of the water wheel?

A. Not at all.

MR. LANGLEY: That is all.

MR. SENN: That is all, Mr. Riggs.

(Witness excused.)

E. W. SPENCER. Called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Senn:

Q. Where do you live?

A. 541 East 12th North, City.

Q. What is your business?

A. I have been master and owner of boats, haven't any just now, I have retired from business.

Q. Been in the steamboat business for many years?

A. Steamboating this river, yes sir.

Q. Were you at Lewiston, at the time of this accident?

A. I was.

Q. On what boat were you?

A. I went up with a delegation from the Chamber of Commerce. I belong to the Chamber of Commerce—from here on the opening of the river, on the Undine, Steamer Undine.

Q. Who was that boat run by?

A. Well, she is owned by Hosford Transportation Company at present.

Q. As I understand, a good many companies sent boats up there. You had eight or ten boats?

A. There was five boats, I think, lying there at the time, O. R. & N. Co., boats and Hosford boats; government had one or two boats there.

Q. United States government?

A. Yes sir.

Q. How far was the Undine from the J. N. Teal, at the time of this accident?

A. We were lying there above the wharf—we docked at Lewiston in the Snake River side. There are two rivers there. Clearwater and Snake River, and we were lying head up stream, with our port side to the beach, and the J. N. Teal came down from—she had been up on one excursion and she came down and landed bow down with her starboard side to the beach, about twenty feet above us—above the bow of the Undine. The two boats were about twenty feet apart.

Q. Where were you standing—or where were you at the time the crowd came aboard the Teal on the second trip?

A. I was sitting on the bow of the Undine on the bitts.

Q. On the what?

A. On the bits, they call them, that they make the lines fast to.

Q. Did you see the crowd?

A. I saw the people going off the Undine, or off the J. N. Teal, and a large crowd on the beach and my attention was attracted to the people going aboard of her—of the Teal.

Q. Did you see any boys in khaki suits coming—

A. That is what attracted my attention over there. About twenty five or thirty young men in brown uniform, I don't know whether they were khaki or not. They came down in a body, one behind each other, in quite a hurry to get aboard and the gang, when the gates fell there—had them on each side of the gang-ways, started to fall, and the men caught it and they stopped the crowd from going aboard so fast—the mate and the collector, or purser, whoever he was there at the gangway on board of the boat.

Q. What is the purpose of the covering of the wheel, Captain?

A. Well, it is more to keep the spray from the wheel blowing all the back end of the cabin than anything else, and it is quite an ornament to the stern as well—covers up that large wheel there.

Q. Is it built for the purpose of walking on it?

A. No sir.

Q. Well, is that apparent to a person of ordinary intelligence, to look at it he could tell that it is not built for the purpose of walking on it?

A. It is built very lightly, or about one by six tongue groove flooring, with a light frame underneath, and they usually have—the government provides that they shall have a stairway back there from the crew or passengers to get on the upper deck in case of accident, more than anything else. that back stairway is there.

Q. Is that stairway built according to government regulations?

A. They compel us to have two gangways, above, one forward and one back to get on the upper deck.

Q. Where do they keep the life boats?

A. On the upper deck—hurricane deck.

MR. SENN: That is all.

CROSS EXAMINATION.

Questions by Mr. Langley:

Q. Captain, in case of necessity of using the life boats would it be necessary to use the stairs leading up to the upper deck?

A. Well, that is the quickest way up. There is another stairway from the engine room up to the boiler deck—the cabin deck, but then that one is the nearest, over the wheel house, the roof, to the life boats. Of course there is a ladder forward. They go up both ways.

MR. LANGLEY: That is all.

(Witness excused.)

JOHN SPONOGLE. A witness called on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Senn:

Q. Were you working on the J. N. Teal at the time of the accident?

A. Yes sir.

Q. Where were you stationed?

A. On the bow, sir.

Q. How long have you been steamboating?

A. About six years.

Q. What was your business in the bow of the Teal?

A. Helping there to keep order for the passengers coming aboard the boat.

Q. Were you near Mr. Steelsmith?

A. No, sir, I was on the bow of the boat and he was on the beach.

Q. Who else was on the bow of the boat, of the crew?

A. I forget the other man's name.

Q. Was the mate there?

A. Yes sir.

Q. Was the purser there?

A. Yes sir.

Q. Did you see the boys in brown suits form on the bank?

A. Yes, I believe I did.

Q. How did they come down to the boat—in what fashion?

A. Indian style, behind each other.

Q. How did they have their hands?

A. On each other's shoulders.

Q. How did they walk down to the gang plank?

A. Well, they came down in a very disorderly style; they were crowding considerable.

Q. What kind of a step did they come down, as you call it.

A. I don't know what kind of a step you would call it.

Q. Lock step?

A. Lock step, something like that, yes.

Q. Did they create any commotion when they got to the end of the gang plank?

A. Yes, then commenced to crowd people off to the gates?

Q. What happened to the gates?

A. They fell down.

Q. Do you remember what Mr. Steelsmith did about stopping the crowd?

A. Yes sir, he threw out his hand and grabbed the other man's hand that was holding the gate, to stop them.

Q. Did they have any instruments with them?

A. Not that I see.

MR. SENN: That is all.

CROSS EXAMINATION.

Questions by Mr. Langley:

Q. State to the jury which end of the line it was that was causing the commotion?

A. The first end of the line.

Q. The first end of the line?

A. Yes sir.

Q. And this commotion you state broke down the gates?

A. Well, it caused the passengers to crowd; these fellows were crowding them off.

MR. LANGLEY: I see; that is all.

(Witness excused.)

F. B. JONES. A witness called on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Senn:

Q. Mr. Jones, where do you live?

A. Live in Portland.

Q. Speak loud so the—

A. I say I live in Portland.

Q. Judge, His Honor and the jury can hear you. How long have you lived in Portland?

A. I have lived here for thirty five years about, I guess.

Q. And what has been your business?

A. I have been steamboating most of the time, all the time.

Q. What position do you occupy with the Willamette and Columbia River Towing Company?

A. Yes, Willamette and Columbia River Towing Company. I am kind of manager now. I used to run the boat myself, but I don't run any boats now.

Q. You are president of the Company?

A. Sir?

Q. You are president of the Company?

A. Yes sir.

Q. As I understand you used to operate boats as a captain.

A. Sir?

Q. Have you ever acted as captain or mate?

A. Yes, I acted as captain for thirty years, I guess, pretty near.

Q. What is the purpose of the wheel house covering, Mr. Jones?

A. Well, it is made out of—the frame, the circulars are sawed gross grain, you know, and then they are lapped up so they are pretty strong and then the covering is about three-fourths stuff by about four inches wide. It is mostly often cedar but I think this is fir. Sometimes it is fir and sometimes they put cedar on. They are put there for the purpose of keeping the water, the spray from the boat, running in the wind, and water flying all over the boat. If you don't have a wheel house to keep it down, principally for that, and of course it helps the looks of the boat some. It ain't the purpose of anybody to go on except a man to wash it off or paint it or something.

Q. Is there any occasion for anybody to go on the wheel-house, except for the purpose of cleaning it, or repairing the wheel-house?

A. No, no occasion at all. The wheel house is built of fir, light construction work, on account of

being way back on the hind end of the boat and if you have them heavy it puts the stern down in the water, and you have to build everything as light as you can back there and make it as strong as you can with light work.

Q. Now, is it built for the purpose of having anybody walk on it?

A. Oh, now, it ain't calculated for more than one or two persons on it at a time. It ain't supposed to have.

Q. How is built flat or rounding?

A. Built rounding—oval.

Q. Now, Mr. Jones, was your boats, this boat, inspected by the Government Inspectors?

A. Yes sir.

Q. How often do they inspect the boat?

A. I believe they come around every three months now. They used to every year, but in the last few years, they have been coming around every three months, inspecting them to see if everything is kept up.

Q. What do they inspect, stairways?

A. Inspect everything, stairways, and notices and everything on the boat.

Q. Signs on the boat, notices?

A. Yes sir, everything. They don't leave nothing undone. If there is anything undone, they get after it.

Q. Do you know whether your boat was inspected before it went to Lewiston on that trip?

A. Yes, I recollect that the inspectors met us in

The Dalles when she got there, to see how many passengers she was carrying and how she was, if she had her equipment, and went aboard of her at The Dalles on that trip when they went up.

Q. Now, do these inspectors inspect the wheel house covering and stairways?

A. Oh, yes, if the wheel house cover looks bad or broke or anything, they make they fix it—repair it up.

Q. During that inspection did the United States Inspectors pass the wheel house and stair?

A. Yes, they passed the whole boat. They went all over it and passed the whole thing. They didn't find any objection to anything.

Q. If there is anything wrong, what do they do?

A. They say "Fix it before you go out."

Q. Make you fix it before they allow you to leave?

A. Say "Fix it before you go out," that is what they tell us and we have got to do it.

MR. SENN: You may cross examine.

MR. LANGLEY: That is all.

(Witness excused.)

MR. SENN: May we have a recess for a few minutes, that will be all the testimony we have. There is one witness we expected, but he has not arrived, and if he doesn't come in a minute or two we will close.

COURT: Have you rebuttal?

MR. LANGLEY: Yes, we will have rebuttal, simply as to the matter of commotion here, that is all.

CHARLES GREGORY. A witness called on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Senn:

Q. Mr. Gregory, where do you live?

A. 484 Union Avenue.

Q. How long have you lived in Portland?

A. Thirty three years.

Q. What is your business?

A. Ship carpenter.

Q. Ship—

A. Carpenter, yes.

Q. How long have you followed that work?

A. Oh I followed the carpenter work for thirty three years.

Q. How long in Portland?

A. Thirty three years in Portland.

Q. How long have you been working for Mr. Jones and the Willamette and Columbia River Towing Company?

A. Well, all last year, I know. I could not tell exactly the time I went there. I left the Vancouver Transportation Company at the time they sold out to the Hosford Transportation Company, and I don't just know when it was exactly, but—

Q. Well, did you repair the covering over the Teal?

A. I did.

Q. After it was broken last May, 1915?

A. Yes sir.

Q. What is the covering made of, what kind of wood?

A. The covering is 1x4 flooring.

Q. What kind?

A. A tongue and groove?

Q. What kind of wood, pine?

A. Fir.

Q. Now, the sleepers that hold the covering?

A. They were circular.

Q. Yes?

A. They are cut out of 1x4—they are lapped together as (illustrating) nailed very close together about 6 or 8 inches apart, stagger them to bind.

Q. What kind of wood.

A. It is fir.

Q. Same kind—

A. Yes, have to saw them out.

Q. Now, did you see any of the old piece, or refuse near where they had broken off?

A. Yes, they were there, the pieces were broken and were there when she came in.

Q. What was the condition of the wood?

A. The condition of the wood was good, I consider.

Q. What is the fact as to whether, when a board or piece of wood is water soaked, and wet for a long time, whether it will splinter when you break it or whether it will break straight through?

A. Oh, no, from being wet it won't splinter up.

Q. Was it decayed or rotten?

A. No.

MR. SENN: You may cross examine.

MR. LANGLEY: No cross examination.

(Witness excused.)

COURT: Is that your last witness?

MR. SENN: That is all.

COURT: Call witnesses in rebuttal.

Defense rests.

REBUTTAL.

RANDALL RAY TUTTLE. Recalled as a witness on behalf of the plaintiff in rebuttal, having been previously sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Langley:

Q. Mr. Tuttle, you have heard the testimony of these gentlemen who have testified that there was commotion there?

A. Yes sir.

Q. I wish you would state whether or not, there was any commotion or crowding on the part of those members of the band of which you were leader?

MR. SENN: Your Honor, we object to that, as not proper cross examination.

COURT: You have been over that.

MR. LANGLEY: I thought so, but I wanted to refresh it in the minds of the jury. If the Court so considers it—

COURT: I don't think it is necessary.

MR. LANGLEY: Very well, we will excuse you, Mr. Tuttle. That is all.

COURT: Is that your case?

MR. LANGLEY: Yes.

(Witness excused.)

Whereupon proceedings herein adjourned to 2 P. M.

Portland, Oregon, April 22, 1916, 2 P. M.

MR. SENN: Your Honor, just for the sake of the record, I would like to move for a directed verdict on the ground there has not sufficient evidence been introduced to submit to the jury, and, second, the evidence shows the deceased took this position voluntarily, without order or directions from anyone and was guilty of contributory negligence.

COURT: Very well. The court will overrule the motion.

MR. SENN: And allow an exception.

COURT: You may have your exception.

INSTRUCTIONS.

Now, Gentlemen of the Jury, you have heard the evidence in this case as it has been given to you from the mouths of witnesses and from the record, and you have also heard the argument of counsel, both pro and con, and now becomes the duty of the court to instruct you as to the law of the case; so that taking the law from the court, you may be enabled to apply it and thereby determine what your verdict shall be under the facts.

I will have to explain to you first, the issues that are involved and that which you have to try and determine. This is an action brought by Ella A. Hutchison against the Willamette and Columbia River Towing Company, a corporation. Ella A. Hutchison is the mother of R. Verne Hutchison, the person who lost his life on the occasion that has been detailed to you. Under the Idaho Statute this accident having occurred in the State of Idaho, the mother, who is the sole heir of the deceased, has the right to bring an action of this kind to recover for certain injuries; that is to say, injuries to her—that is, for the loss of companionship and society of her son.

Now, the complaint, leaving out the matters which are formal, and with which you have but little to do, simply alleges the sole heirship of the complainant; that is to say, that she is the sole heir of her son, E. Verne Hutchison, and that it alleges that at the date of death of R. Verne Hutchison, he was a resident of Endicott, State of Washington. That is immaterial. Then, again, that on the third day of May, 1915, while the steamboat J. N. Teal was in the Snake River and docked at Lewiston, Idaho, then being owned and operated by the defendant herein, R. Verne Hutchison was accepted by the defendant thereon as a passenger. That shows the relationship of the deceased to the defendant company. Then it is further alleged in paragraph VII. that said R. Verne Hutchison boarded said boat on the first deck and passed to the stern of said boat for the purpose

of ascending to the upper deck; that for the purpose of using certain permanent stairs, generally used as a means of ascending and descending, between the two decks, it became necessary for said R. Verne Hutchison to go upon the covering of the water-wheel of said steamer; that while attempting to ascend said stairs aforesaid, the said covering over said water wheel broke through, letting said R. Verne Hutchison fall through said water-wheel into the water of the said Snake River and said R. Verne Hutchison was thereby drowned.

Now, that shows how the accident occurred. And then it is alleged that it occurred through the negligence of the defendant company and the negligence relied is set out as follows: First, that it failed to provide a safe landing or stairs from the first to the second deck. That is one item of negligence. Another item of negligence is that defendant failed to warn decedent not to use said stairs or not to go upon the covering of the said water wheel. Third, that by reason of that lack of warning or guards, and the presence of the stairs with a board leading from the railing of the lower deck to the base of landing of said stairs on said water wheel, defendant thereby held out an invitation to decedent to go upon the covering of the water wheel and use said stairs. Fourth, that the covering of said water wheel was not sufficiently strong for the purpose for which said defendant was allowing the same to be used. And fifth, that defendant allowed or permitted passengers, and more particularly the decedent, to go up

on the covering of said water wheel: That the covering of said water wheel had been allowed to deteriorate in strength.

Now, Gentlemen of the Jury, that is the complaint in this case, and it is alleged that R. Verne Hutchinson was a passenger thereon, and the evidence tends to show that he entered upon the boat without a ticket, but with permission to enter and ride upon the boat. It makes no difference whether he paid his fare or was required to pay any fair, or failed to pay fare. He was nevertheless a passenger and must be treated as a passenger upon this boat.

Such is the cause of action alleged here. The basis of the action is negligence. Negligence on the part of the defendant company committed by it, and I will explain to you later on what is meant by negligence. Now, the plaintiff must recover upon the ground of negligence, alleged in the complaint, and she can recover upon no other negligence or no other cause, except such as is alleged in this complaint, and such negligence as I have read to you, that is charged by the plaintiff against the defendant.

The plaintiff has the affirmative of establishing the allegations of the complaint, and hence the plaintiff has the burden of proof, and that requires the plaintiff to establish her allegations by a preponderance of the evidence. What we understand preponderance of evidence is such evidence that causes the scales of justice to bear down upon one side or the other. If it bears down ever so little upon the side of plaintiff, then the plaintiff has established her

case by a preponderance of the evidence. If the scales of justice should stand at equal balance, then there is no preponderance and she could not recover, and, of course, if the scales stood with the balance upon the other side, the preponderance would be against the plaintiff.

Now, the defendant has interposed an answer to this complaint, first by denying these material allegations, and especially denying the allegations of negligence. That puts upon the plaintiff the burden of establishing those by a preponderance of evidence. The defendant has furthermore set up what is termed a further and separate defense, and that is an affirmative defense upon the part of the defendant company. That defense is in effect that the deceased was himself guilty of negligence, which negligence conduced to his own injury. This is one of the defenses that is interposed, and it is alleged in particular in what way he was negligent. It is said that R. Verne Hutchison—I will read further back: That on or about the 3rd day of May, 1915, the said Steamer J. N. Teal was at the boat landing at Lewiston, Idaho. That at said time the said deceased R. Verne Hutchison boarded said Steamer Teal; that thereupon said R. Verne Hutchison proceeded to the stern of said steamer and carelessly and negligently went out and upon the covering of the wheel of said steamer Teal; that said Hutchison has no right there or authority to go out upon said covering of said wheel and that Hutchison went out upon said wheel contrary to the orders and against

the wishes of the defendant; that because of the carelessness and negligence on the part of Hutchison, deceased, in going out upon said covering of said wheel, the said covering broke and said Hutchison was precipitated into the water and was thereby drowned. And then it mentions that he was careless in that respect, and that that carelessness contributed to his own injury.

It is further alleged that certain warnings were given, such as notice, and that persons were stationed to warn people away from the place, and to prevent people from being injured, and there is another defense also interposed in the same conjunction, which is that the accident happened without the negligence or the carelessness of anyone; that is, without the negligence of the plaintiff and without the negligence of the defendant, that it was a pure accident, and no one was to blame for it. Those are the two defenses that the defendant interposed here.

Now, I will instruct you as to the duty of a carrier. The defendant in this case is termed a carrier of passengers. It owned the boat and it was engaged in the business of transporting men, women and children, and therefore it is called a carrier of passengers. Such a person or such a corporation owes to the public a high degree of duty; that is, it owes to its passengers a high degree of duty to see that they do not meet with accident or injury.

Negligence, I will define to you, is the doing of some act or thing, which a careful or prudent per-

son would not do under like circumstances or conditions, or it is the leaving undone some act or thing which a careful and prudent person having in view the safety of others, would have done under like circumstances and conditions. Now, that is the definition in an ordinary case, but in this case, the defendant company owed to the passengers and owed to this decedent a higher degree of care than that. Some authorities say "A very high degree of care," but a carrier of passengers is charged with a higher degree of duty than this. Some of the books say a very high degree of care, diligence and foresight, "and some the very highest degree of care," and so forth. The true rule to my mind is this: "That the carrier is required to exercise that degree of care, commensurate to his undertaking, and in view of the circumstances and conditions attending the service he has assumed to render. To illustrate: The defendant company operates a steamer, propelled by a steam power; it operates a boat at a high rate of speed, or as fast as the circumstances will permit of its operating such a craft. The defendant carries large numbers of people and persons of all ages, men, women and children of varying judgment and discretion. Now, having engaged in such an undertaking the law imposes upon the carrier that degree of care, foresight and prudence commensurate with the undertaking to see that the passengers shall be protected against accident and danger. This means a high degree of care, and circumspection. It may not mean the very highest degree of

care, but it does mean such a high degree of care, altogether commensurate with the danger to be anticipated by careful and prudent and experienced persons engaged in that kind of business to see that the passengers or those who are entrusted to their care or who take passage upon the boat shall be protected against injury and accident. While the carrier is not an absolute insure against accident, he is charged with the kind of care and prudence and foresight I have endeavored to explain to you.

When, however, he has exercised the care imposed upon him, such as I have indicated, he has discharged his whole duty, and if accident happened without his fault in the particulars I have explained he is then not liable, but if he fails in his duty in this regard and accident does happen, and that accident is the proximate result of his negligence or carelessness or his failure to exercise that degree of care, then he would be liable. You must understand, gentlemen of the jury, that the negligence that I speak of here, must be the proximate cause of the injury complained of; that is to say, the cause without which the injury would not have happened.

Now, to particularize a little, the defendant was required to properly officer its boat so as to properly handle the crowd and to keep it in the place it ought to be on and about the boat and to prevent its going on or about places it ought not to go, or in places that would be dangerous; and also it should give proper warning, and it might do that by notice or it might do that by having officers stationed about

the boat in order to prevent the crowd from going into dangerous places; and to this end, it should give proper warning of danger and peril.

It should also see that all gangways and walks and passages which the public were allowed to use should be safe and protected; and if peril threatened at any place, that place should be properly guarded by barriers and guard-rails and ropes so as to prevent intrusion beyond the limits of the passage way, and in this way the passengers should be protected, especially upon occasions of this kind, where the boat was thronged with people. And so it will be for you to determine as to the place where the accident occurred. You will take into consideration the roof above the wheel, and determine its conditions; you will take into consideration the walkway passing back to the foot of the ladder, and how that was arranged, and you will take into consideration, the way in which they got from the walkway onto the ladder, and then you will determine whether, under the conditions and circumstances the way was properly protected so that people would not get into danger. Determine first, whether it was dangerous to go out upon this covering, and then, second, whether it ought not to have been protected differently from what it was, and then you will determine from all, that whether or not the defendant was negligent, having in mind the rule that I have given you as to the degree of care it should exercise in the premises.

Now, then, as to the defense. Defendant says that

the deceased was himself negligent. That he went into a place of danger and by reason thereof, was killed. Now the deceased was required to exercise ordinary care and prudence for his own safety. He was required to use his senses, to use his eyes and look about and to see the conditions and determine for himself whether or not there was danger, and if he saw that there was danger, why, then, he should not have gone into it. And so you will determine in this case, whether or not the deceased himself has been guilty of negligence. I speak of ordinary negligence here, because he was only charged with the ordinary degree of care and foresight, not the highest degree of care, as the defendant is in this case, but he is charged with the exercise of ordinary care and foresight for his own protection.

Now, there is a rule, gentlemen of the jury, which I will call your attention to and it applies in this case. If the deceased was guilty of negligence contributing to his own injury, he could not recover, although it might appear to you from the evidence in this case that the defendant was negligent, in the premises, because of the negligence of the deceased, would be the one nearest to the accident. It would be the nearest cause to the accident, the proximate cause to the accident, hence the rule that if the deceased was himself negligent, conducing to his own injury, he could not recover, although the defendant was negligent.

As to the second defense, I will advise you gentlemen of the jury, that if it appears in this case that

the defendant was not negligent in any way and that the deceased himself was not negligent in any way, and that this injury that he received was a result of a pure accident, for which nobody is responsible, then, of course, the plaintiff could not recover.

Now, gentlemen of the jury, you are the sole judges of the effect of the testimony. The Court gives you the law and you take that implicitly from court, and you apply it and must determine what facts have been proved and determine what the effect of the testimony is and thereby you will determine what your verdict should be.

This rule is not an arbitrary rule, but it is a rule to be observed in obedience to the rules of evidence. For instance, the testimony of several witnesses is not to be taken absolutely as proving the fact, they testified to as against a lesser number of witnesses, but you are to be guided by the conviction that the testimony shall bring to your minds and it might happen that the testimony of one witness will weigh more with you than the testimony of half a dozen, and so it is for you to judge as to the weight of the testimony by the conviction that it brings to your intellects.

Now, a witness is presumed to speak the truth, but this presumption may be overcome by the manner in which he testifies and by the character of his testimony and by testimony going to his character, or his motives or by contradictory evidence. A witness found to be false in one particular is to be distrusted in others, and also a person's evidence may

be effected by the interest which he may have in the case or in other surrounding or attending circumstances. And so, taking into account all these, you will determine the credibility of a witness; you may take note of the witness as he appears upon the witness stand and observe whether he appears to be speaking truthfully and desires to have you have the whole testimony or the whole facts in the case, or whether he seems to be reticent and is reserving something, and thereby you will determine as to that particular witness what credibility he is worthy of and you will give him the credibility accordingly as he demands. And thus by determining the credibility of the witness, in the end, you will determine what the effect of the testimony is and therefrom you will make up your verdict.

Now, gentlemen of the jury, that leaves but one other question for me to instruct you about, and that is the measure of damages.

Now, this case is based for the amount of damages to be assessed, if you should find for the plaintiff, upon the loss of companionship and society. The plaintiff is the mother of the deceased and that the relationship that you have to consider and hence you will take into consideration certain matters in determining that. In determining the amount you may take into consideration the age, health and intelligence of the child, the degree of the intimacy existing between the father and the child—in this case the mother and the child—and the loss of companionship and society, if such shall be shown, to

gether with what expenses may have been incurred as shown by the evidence, by the mother for the funeral and medical expenses. There have been no such expenses proven here, and this depends altogether upon the loss of the companionship and society that the mother has sustained by reason of the death of this child. And you will have to determine that by money value as near as you can, and say from all the evidence in the case, and the relationship of these parties the amount that you shall render.

You may take into consideration, also, the age of the son, when he was killed and you may take into consideration his expectancy of life, which it is stipulated here is thirty-nine years, and all these matters you will take into consideration in determining what you shall say the money value of the loss of companionship and society has been to his mother.

Now, gentlemen of the jury, there is one other thing that I will speak to you about and that is, what the Court may have said at any time, during this trial, from which you might infer that the Court has an opinion as to what the testimony proved, as a matter of fact, that you will disregard because that is outside of the province of the Court, and is wholly within your province, therefore you will find your verdict as to the facts independent entirely of what the Court may have said leading you to infer any such judgment on the part of the Court.

COURT: Gentlemen, have you any exceptions to say?

MR. LANGLEY: We have no exceptions, Your Honor.

COURT: Mr. Senn:

MR. SENN: Just to those instructions requested and not given by the Court, and instructions of the Court that the ship was not properly officered, and also where the Court said to prevent people from going to dangerous places, or to prevent intrusion, or if the roof should be protected differently.

COURT: Yes, very well. You may qualify the officers.

(Officers sworn.)

INSTRUCTIONS REQUESTED BY DEFENDANT.

The plaintiff brings an action to recover damages on account of the death of her son on May 3rd, 1915. The plaintiff alleges and claims that the defendant was careless and negligent in that it carelessly and negligently failed to provide a safe passageway from the first to the second deck, or what is commonly known as the "hurricane" deck. Also that the defendant was careless and negligent in not warning the deceased, R. Verne Hutchison, of the danger of going upon the covering of the water-wheel; also that the defendant company was careless and negligent in that it had no warning signs or guards; and because the covering of the water-wheel was not sufficiently strong; and that defendant carelessly and

negligently allowed the deceased to go upon the covering of the water wheel. These are the allegations or claims of negligence on the part of plaintiff.

The defendant company admits that it is a corporation of the State of Oregon, and admits that R. Verne Hutchison was drowned by falling through the covering of the wheel of the Steamer J. N. Teal; the defendant also admits that it owned and operated the steamer known as the J. N. Teal, but the defendant company denies that it has been careless or negligent, or that its carelessness or negligence in any way caused the death of the deceased R. Verne Hutchison.

The defendant company alleges that R. Verne Hutchison was careless and negligent because of the position he took upon this water-wheel, and because he went upon this water-wheel covering voluntarily without any orders or instructions from the defendant or the defendant's officers; and the defendant further alleges that so far as it was concerned the death of R. Verne Hutchison was wholly unavoidable and could not have been prevented by the exercise or the care required by law.

II.

This is an action based upon negligence. The plaintiff has alleged that the defendant company has been negligent and that this negligence caused the death of R. Verne Hutchison. Negligence is never presumed. The law in this case presumes that the defendant company performed its duty toward the

deceased, and that it was not negligent. In order for the plaintiff to recover damages in this case, it is necessary for the plaintiff to prove by a preponderance of the evidence the negligence of the defendant company, and that this negligence was the proximate cause of his death. If plaintiff does not prove that the defendant has been negligent by a preponderance of the evidence, or if you find that the evidence is evenly balanced, then your verdict must be for the defendant company.

III.

It is in evidence in this case, that there was a stairway running from the second to the hurricane deck of this boat, and it appears that this stairway at the stern of the boat was provided by the defendant company. It was the duty of the defendant company to exercise a high degree of care in maintaining and keeping in order this stairway, providing it permitted this stairway to be used by passengers who may have been on the boat at the time of the accident, but this duty of maintaining this stairway and keeping it in good condition did not extend to the keeping of the covering of the wheel in good condition, providing you find that this wheel covering was not constructed or intended for use by passengers in walking over it; in other words, the defendant was under no obligation to the deceased, R. Verne Hutchison, to keep the covering of the wheel in good condition, provided this covering of the wheel was not intended to be used as a passageway

by the deceased, and was not intended for that purpose, so that if you find that the covering over this wheel was merely for the purpose of keeping the wheel from throwing water onto the deck of the boat and was not constructed or intended to be used as a passageway or a runway for passengers, then I instruct you there was no obligation on the part of this defendant company to keep in repair or condition this covering of the wheel, and your verdict must then be for the defendant company.

IV.

There is another rule of law to which I will call your attention, which is as follows: where there are two ways of reaching a given point; one of which is dangerous and the other safe, it is the duty of a person to pursue the safe way; so in this case if you find that the company had provided a ladder or a stairway from the second to the hurricane deck, and that this was a safe way by which to reach the hurricane deck, and that the deceased, R. Verne Hutchison, could have proceeded up the ladder, but instead walked out upon the covering of the wheel, which was out of his way, and which was apparently dangerous, and he could see that this covering or as a person of ordinary prudence ought to have seen that this covering was not intended to walk upon, then I instruct you that the plaintiff cannot recover damages in this case, and your verdict must be for the defendant.

V.

In this action, both parties were obliged to exer-

ercise care. It was the duty of the deceased, R. Verne Hutchison, to exercise ordinary care to prevent being injured. It was his duty to use his senses and his faculties and to look and avoid being injured. If he could do so by the exercise of ordinary care, and if you find that as an ordinarily prudent person he did not exercise ordinary care, which is such care as a man of ordinary prudence would have exercised under like conditions, then the plaintiff cannot recover damages in this case, and your verdict must be for the defendant company.

VI.

If you find that deceased, R. Verne Hutchison, did not exercise that degree of care which an ordinarily prudent man would have exercised under like conditions in going out upon this wheel covering, and that this contributed to his death, then I instruct you that the plaintiff cannot recover in this case, and your verdict must be for the defendant company. If you find that both parties were negligent; that is, if you find that the deceased R. Verne Hutchison was negligent and you also find that the defendant company was negligent, then your verdict must be for the defendant. That is, in accordance with the rule of law, which is to the effect that where both parties are negligent and their negligence contributes to the injury or death, in such case the law leaves the parties where it finds them and damages cannot be recovered.

VII.

There is another rule of law pertaining to the question of accidental injuries. Accidents may happen and no one be at fault. The most serious catastrophe may befall a person and yet it may be the result of what the law calls an accident, and in such case no one is at fault and no one can be held answerable in damages. So in this case, if you find that this was an accident in which no one was at fault, then I instruct you that the plaintiff is not entitled to a verdict, and you must find for the defendant. The defendant company was not an insurer of the safety of its floor or of this wheel covering and the mere fact that this wheel covering may have been broken at the time of this accident, and the mere fact that the deceased R. Verne Hutchison was precipitated through the opening and drowned is not in itself sufficient to entitle the plaintiff to a verdict. As I have before stated, this is an action based upon negligence and the plaintiff must prove by a preponderance of the evidence the negligence of the defendant company and that this negligence was the proximate cause of the death of R. Verne Hutchison.

VIII.

You must first consider whether or not the defendant company has been negligent and whether the defendant company is liable to the plaintiff in damages. If you find that the defendant company is not liable in damages under the instructions as

heretofore given, then that will end your deliberations, and your verdict must be for the defendant. If on the other hand, you find that the defendant company is liable in damages under the instructions heretofore given and the evidence as you have heard it, then it is your duty to assess the damages to which the plaintiff is entitled. In assessing damages, you are not to be guided by sympathy or prejudice. The mere fact that the defendant is a corporation should not influence you one way or the other in awarding damages. The question of the defendant being a corporation is immaterial so far as your deliberations in this case are concerned, nor are you to award any damages, because of sympathy or feeling which you may have for the plaintiff and the relatives of this deceased. The law aims in all cases of this kind, when a person is entitled to damages, at compensation for the pecuniary loss which the plaintiff has suffered by reason of the death. It is in evidence here that the deceased was 24 years of age. He was a single man and his mother is his sole beneficiary and heir. It is in evidence that the mother is 59 years old. In your deliberations if you come to the question of damages, you may consider the age of the deceased R. Verne Hutchison; you may consider his habits, his industry, his physical condition, his intelligence and the ties of friendship and affection which existed between the deceased and plaintiff. You may also consider the age of the mother and her physical condition, the probable length of her life, and the probable pecuniary loss,

if any, which she will suffer by reason of the death of this deceased, and award such damages, taking into consideration all of the elements I have mentioned as will reasonably compensate the plaintiff for the pecuniary or money loss which she has suffered as a result of the death of the deceased.

**In the District Court of the United States for the
District of Oregon.**

ELLA A. HUTCHISON,

Plaintiff,

vs.

WILLAMETTE & COLUMBIA RIVER TOWING
COMPANY, a Corporation,

Defendant.

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that the above entitled action came on for trial on the 21st day of April, 1916, before the Honorable Charles E. Wolverton, Judge of the above entitled court, and a jury duly and regularly impaneled and sworn to try the issues of fact arising in said action; whereupon the plaintiff to prove the issues on her part, introduced the deposition of Dell Wilson, and among other things, the following proceedings were had:

I.

MR. LANGLEY: That is all of that deposition. (Reads deposition of Dell Wilson.) Reading: State whether or not on this trip you were on the hurricane deck of the boat?

A. Yes, we were.

MR. SENN: Just a minute, Your Honor, we will object to that as irrelevant, immaterial and incompetent. It may have happened on any other trip not in evidence.

COURT: This is a previous trip?

MR. LANGLEY: This is a previous trip, and I am introducing this to cover exactly the same point that I was introducing the photographs for, to show what the custom and practice was of the passengers of going to the hurricane deck, and that it serves the purpose of showing that the defense must have had notice that the upper deck was being occupied by passengers.

COURT: You are trying to show further here that there was no notice.

MR. LANGLEY: I beg your pardon?

COURT: You are trying to show further here that there was no notice?

MR. LANGLEY: Yes.

COURT: That particular day. Special notice ought to have applied to the day of the accident.

MR. LANGLEY: If your Honor understands me, I don't mean by that that I am attempting to say that there was posted notice, by the depositions; that is not the purpose of this deposition.

COURT: I think you can show the custom or practice of going to the upper deck; I will permit you to do that, but I don't think you ought to show notice on that day. Notice should have been given on another day, so far as this accident—

MR. LANGLEY: The remark that I made of notice, perhaps the Court misunderstood what I mean by that; I mean that that would be notice to the defense that there were passengers going to the upper deck; that is the question I referred to.

COURT: Read that question again.

MR. LANGLEY (Continues reading deposition):

“Q. State whether or not on this trip you were on the hurricane deck of the boat?

A. Yes, we were.

Q. State whether or not your wife and daughter were on the hurricane deck of this boat on this trip?

A. Yes, they were.

Q. If your answer is that you and your wife and daughter were on the hurricane deck of this boat on the trip above referred to, state by what stairs, if any, you and your wife and daughter ascended to the hurricane deck.

A. We went up by the stairs over the water-house.

Q. If you testify that you and those accompanying you had ascended by the stairs leading from the covering of the water-wheel to the hurricane deck, state whether or not you saw other persons than those engaged in the service of the boat using the same stairs as a means of ascent to the hurricane deck.

A. I did; I saw women and the band boys, and men, too, that I don't think were employed by the boat.

Q. If you testify you saw other persons than

those engaged in the service of the boat using the stairs, state about how many.

A. I would say a dozen or fifteen, before I went up, besides the number that went up afterwards.

Q. State whether or not you saw other persons than your wife and daughter upon the hurricane deck of the boat on this trip.

A. I did.

Q. If your answer be that you did see other persons than those mentioned, state about how many persons you saw on the hurricane deck.

A. In the neighborhood of thirty or forty.

MR. SENN: Just a minute, Your Honor, those are all objected to. I would like to get the ruling of the Court.

COURT: The ruling of the Court will be that the objection will be overruled.

MR. SENN: Exception allowed?

COURT: Yes, you have an exception.

MR. SENN: To all these?

COURT: Yes.

Defendant by its counsel objected to the introduction of the foregoing testimony for the reason that same was irrelevant, immaterial and incompetent, which objection was by the Court overruled and an exception allowed defendant. (Deposition of Dell Wilson.)

II.

To further sustain the issues on the part of the plaintiff, the deposition of Ella A. Hutchison, the

plaintiff, was introduced and contained among other things, the following:

* * * Q. What, if any, degree of affection existed upon the part of R. Verne Hutchison for yourself, and upon your part for your son R. Verne Hutchison?"

MR. SENN: We will object to that as irrelevant, incompetent and immaterial and not a measure of damages—not an element.

COURT: I will overrule that objection; I think that is proper.

MR. SENN: Save an exception.

THE COURT: Very well, you will be allowed an exception.

Defendant by its counsel objected to the introduction of the foregoing testimony for the reason that same was irrelevant, incompetent and immaterial and not a measure of damages and not an element, which objection was by the Court overruled and an exception allowed defendant. (Deposition of Ella A. Hutchison.)

III.

At the close of all of the testimony on behalf of both the plaintiff and defendant, defendant by its counsel moved the Court for a directed verdict, said motion being as follows:

MR. SENN: "Your Honor, just for the sake of the record, I would like to move for a directed verdict on the ground there has not sufficient evidence been introduced to submit to the jury, and second, the evidence shows that the deceased took this posi-

tion voluntarily, without orders or directions from anyone and was guilty of contributory negligence.

COURT: Very well; the Court will overrule the motion.

MR. SENN: And allow an exception?

COURT: You may have your exception.

That the Court, then and there overruled said motion and an exception was allowed defendant.

IV.

At the close of all of the testimony and after defendant's motion for a directed verdict had been overruled, defendant requested the Court to instruct the jury as follows:

“It is in evidence in this case that there was a stairway running from the second to the hurricane deck of this boat, and it appears, that this stairway at the stern of the boat was provided by the defendant company. It was the duty of the defendant company to exercise a high degree of care in maintaining and keeping in order this stairway, providing it permitted this stairway to be used by passengers who may have been on the boat at the time of the accident, but this duty of maintaining this stairway and keeping it in good condition did not extend to the keeping of the covering of the wheel in good condition, providing you find that this wheel covering was not constructed or intended for use by passengers in walking over it; in other words, the defendant was under no obligation to the deceased R. Verne Hutchison to keep the covering of the

wheel in good condition provided this covering of the wheel was not intended to be used as a passageway by the deceased, and was not intended for that purpose, so that if you find that the covering over this wheel was merely for the purpose of keeping the wheel from throwing water onto the deck of the boat and was not constructed or intended to be used as a passageway or runway for passengers, then I instruct you there was no obligation on the part of the defendant company to keep in repair or condition this covering of the wheel and your verdict must then be for the defendant company.”

Which instruction was by the Court refused and the defendant excepted to the ruling of the Court in refusing to instruct the jury as requested and an exception was duly allowed defendant.

V.

Defendant further requested the Court to instruct the jury as follows:

“There is another rule of law to which I will call your attention, which is as follows: Where there are two ways of reaching a given point; one of which is dangerous and the other safe, it is the duty of a person to pursue the safe way; so in this case if you find that the company had provided a ladder or stairway from the second to the hurricane deck, and that this was a safe way by which to reach the hurricane deck, and that the deceased R. Verne Hutchison could have proceeded up the ladder, but instead walked out upon the covering of the wheel, which

was out of his way, and which was apparently dangerous, and he could see that this covering, or as a person of ordinary prudence ought to have seen that this covering was not intended to walk upon, then I instruct you that the plaintiff cannot recover damages in this case, and your verdict must be for the defendant.”

That the Court refused to give the foregoing requested instruction and an exception was duly allowed defendant.”

VI.

That the defendant also requested the Court to instruct the jury as follows:

“You must first consider whether or not the defendant company has been negligent, and whether the defendant company is liable to the plaintiff in damages. If you find that the defendant company is not liable in damages under the instructions as heretofore given, then that will end your deliberations, and your verdict must be for the defendant. If on the other hand, you find that the defendant company is liable in damages under the instructions heretofore given and the evidence as you have heard it, then it is your duty to assess the damages to which the plaintiff is entitled. In assessing damages, you are not to be guided by sympathy or prejudice. The mere fact that the defendant is a corporation should not influence you one way or the other in awarding damages. The question of the defendant being a corporation is immaterial so far

as your deliberations in this case are concerned, nor are you to award any damages because of sympathy or feeling which you may have for the plaintiff and the relatives of this deceased. The law aims in all cases of this kind, when a person is entitled to damages, at compensation for the pecuniary loss which the plaintiff has suffered by reason of the death. It is in evidence here that the deceased was 24 years of age. He was a single man and his mother is his sole beneficiary and heir. It is in evidence that the mother is 59 years old. In your deliberations if you come to the question of damages you may consider the age of the deceased R. Verne Hutchison; you may consider his habits, his industry, his physical condition, his intelligence and the ties of friendship and affection which existed between the deceased and the plaintiff. You may also consider the age of the mother and her physical condition, the probable length of her life, and the probable pecuniary loss if any which she will suffer by reason of the death of this deceased, and award such damages, taking into consideration all of the elements I have mentioned, as will reasonably compensate the plaintiff for the pecuniary or money loss which she has suffered as a result of the death of the deceased.”

That the Court refused to give said requested instruction and an exception was duly allowed the defendant.

VII.

That the Court then and there instructed the jury among other things as follows:

“Now to particularize a little, the defendant was required to properly officer its boat so as to properly handle the crowd and to keep it in the place it ought to be on and about the boat and to prevent its going on or about places it ought not to go or in places that would be dangerous; and also it should give proper warning, and it might do that by notice or it might do that by having officers stationed about the boat in order to prevent the crowd from going into dangerous places; and to this end it should give proper warning of danger and peril. It should also see that all gangways and walks and passages which the public were allowed to use should be safe and protected; and if peril threatened at any place that place should be properly guarded by barriers and guard-rails and ropes so as to prevent intrusion beyond the limits of the passageway, and in this way the passengers should be protected, especially upon occasions of this kind, where the boat was thronged with people. And so it will be for you to determine as to the place where the accident occurred. You will take into consideration the roof above the wheel and determine its condition; you will take into consideration the walkway passing back to the foot of the ladder and how that was arranged, and you will take into consideration the way in which they got from the walkway onto the ladder, and then you will determine whether, under the conditions and circumstances, the way was properly protected so that people would not get into danger. Determine, first, whether it was dangerous to go out upon this cover-

ing and then, second, whether it ought not to have been protected differently from what it was, and then you will determine from all that whether or not the defendant was negligent, having in mind the rule that I have given you as to the degree of care it should exercise in the premises.”

That the defendant excepted to the giving of the foregoing instructions and said exception was duly allowed.

WHEREUPON the Court now being willing to preserve the record in order that its ruling may be reviewed for error, if any there be, now certifies that the foregoing bill of exceptions contains all of the evidence offered or admitted on the trial, together with the rulings of the Court and all of the instructions given by the Court, together with all of the instructions requested by the defendant, and also all exhibits.

WHEREUPON, this bill of exceptions is now here settled, certified and signed this 17th day of June, 1916.

CHAS. E. WOLVERTON,
Judge.

Filed July 17, 1916. G. H. Marsh, Clerk.

UNITED STATES OF AMERICA,
District of Oregon,—ss.

I, G. H. MARSH, Clerk of the District Court of the United States, for the District of Oregon, do hereby certify that I have prepared the foregoing

transcript of record on writ of error in the case in which Ella A. Hutchison is plaintiff and defendant in error, and The Willamette and Columbia River Towing Company is defendant and plaintiff in error, in accordance with the law and the rules of Court, and that the said transcript is a full, true, and correct transcript of the record and proceedings had in said court in said cause as the same appear of record and on file at my office and in my custody.

And I further certify that the cost of the foregoing transcript of record is \$..... for printing said transcript, and that the same has been paid by said plaintiff in error.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Portland, in said district, this day of July, 1916.

Clerk.

